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1. Accord without satisfaction is not a good defence to an action of trespass; so where a lot of ground is wrongfully entered upon and levelled even with the grade of a street, the fact that such trespasser, after commencing the grading of the lot, agrees with the owner of the lot to curb it in return for the privilege of carrying away the earth from its surface, if such agreement remain unexecuted, will not be a bar to an action to recover damages for the trespass. *Goff v. Mulholland*, 397.

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ADMINISTRATION.

1. Upon the dissolution of a partnership by the death of a partner, the surviving partner may proceed to wind up and settle the affairs of the partnership without giving bond as required by the fifth section of the first article of the act respecting executors and administrators; he may transfer a promissory note held by the partnership in payment of a partnership debt or liability. *Bredow* v. *Mutual Savings Institution*, 181.
2. Should the surviving partner fail, within the time limited, to give bond as required by the fifty-fifth section of the first article of the administration act, he is liable to be ousted from possession of the partnership effects, and divested of the right to administer on the same, by the executor or administrator of the deceased partner, if the latter should give bond as required by the fifty-ninth section of the first article of said act. *Id.*
3. A., a tenant for life only of certain real estate but possessed of a full power to dispose thereof by appointment by will, leased the same to B. for a term of ten years. A. died before the expiration of said term

ADMINISTRATION—*(Continued.)*

without having attempted to protect the tenant by exercising the power of appointment, and the tenant was evicted by the remainder man. *Held*, that B. might maintain an action against A.'s administrator to recover damages for a breach of the covenant implied from the word "lease" in the instrument of lease. *Hamilton* v. *Wright's Administrator*, 199.

4. An appeal will lie from an order of a probate court revoking letters of administration; the appeal will not, however, operate a suspension of the effect of the order. *Harney* v. *Scott*, 333.
5. The Kansas city court of common pleas, established by the act of the general assembly approved November 20, 1855, (Sess. Acts, 1855, Adj. Sess. p. 60,) does not possess probate jurisdiction. *Burke's Adm'rx.* v. *Walroud*, 591.

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AGREEMENT.

See DAMAGES, 1, 2, 6, 7. SECURITY FOR COSTS. CONVEYANCE. STATUTE OF FRAUDS. COVENANT.

1. An agreement to purchase an improvement on public land made before the entry of such land in the land office will, if entered into before the entry of the land, support an action; if such agreement be made after the entry of the land, it will be void for want of consideration. *Welch* v. *Bryan*, 30.
2. An agreement on the part of the landlord, that the tenant may take off and carry away any and all buildings, sheds and other temporary houses and improvements he may erect, would not be construed to authorize the taking away of erections, the removal of which would cause material injury to the property of the landlord. *Powell* v. *McAshan*, 70.
3. In a suit to recover damages for the breach of a written contract entered into with two persons, both must join as parties plaintiff. The fifth section of the second article of the practice act is inapplicable to such a case. (R. C. 1855, p. 1218.) *Ranney* v. *Smizer*, 366.
4. A. was appointed attorney for a bank for a term of two years. His compensation as such attorney was three per cent. upon all collections made by him in the county in which the bank was located, and five per cent. upon all collections made out of said county. During his term of office, he obtained judgment in favor of the bank upon a claim deposited in his hand for collection. *Held*, that he was entitled to his three per cent. commission on the amount recovered, whether he received the money on the judgment during his term of office or not. *State, to use, &c.*, v. *Hawkins*, 366.
5. Certain contractors agreed with a plank road company "to do the necessary masonry, grading, gutters and all things else pertaining to the com-

AGREEMENT—(*Continued*)

plete graduation and masonry" of a division of the plank road. The company agreed to pay "at the rate of sixteen cents per cubic yard for all *excavation of earth* done on said road under this contract." Unexpectedly to both contracting parties, the contractors, in fulfilling their contract, met with a large amount of indurated earth and cemented gravel, which they excavated. *Held*—it appearing that among engineers and contractors indurated earth and cemented gravel were known and recognized as entirely distinct from common earth, and that it was customary for contractors to receive extra compensation for excavating such materials—that the price to be paid the contractors for the excavation of such materials was not provided in the contract, and that consequently they might recover what the same was reasonably worth. *Shephard* v. *St. Charles Western Plank Road Co.*, 373.

6. Accord without satisfaction is not a good defence to an action of trespass; so where a lot of ground is wrongfully entered upon and levelled even with the grade of a street, the fact that such trespasser, after commencing the grading of the lot, agrees with the owner of the lot to curb it in return for the privilege of carrying away the earth from its surface, if such agreement remain unexecuted, will not be a bar to an action to recover damages for the trespass. *Goff* v. *Mulholland*, 397.
7. Where two adjoining proprietors agree to put up a partition fence between them, each to own that portion of the fence put up by himself, and the fence built by one is mistakenly located upon the land of the other, and the latter sells his tract to a person who has no notice of the agreement as to the ownership of the fence, such purchaser will take the fence so located upon his land. *Climer* v. *Wallace*, 556.
8. A. conveyed to B. a slave in trust to secure and indemnify the latter against loss by reason of his being security for A. B. acting under a power in the deed of trust sold said slave to C., taking a bond to himself "as trustee of A." for a portion of the purchase money. The slave was afterwards taken from the possession of C. by the true owner from whom A. had stolen him. *Held*, that there was a failure of consideration of the bond, and payment thereof could not be enforced against C. *Long* v. *Gilliam*, 560.
9. A parol agreement respecting the sale of land, of which there has been part performance, is not within the statute of frauds. Possession alone, without payment, is sufficient part performance to authorize a decree for a specific execution; but the possession must be under the contract and not a mere tenancy, or taken under some other contract; and the contract must be unequivocally established. *Young* v. *Montgomery*, 604.

APPEAL.

See COUNTY COURTS.

1. Granting that an appeal would lie from the judgment of a county court in a proceeding instituted to obtain a removal of the seat of justice, it would only lie in the case of a final judgment. *Wood* v. *Phelps County Court*, 119.
2. Neither under the general act regulating the removal of seats of justice

APPEAL—(*Continued.*)

(R. C. 1855, p. 513), nor under the act organizing Phelps county (Sess. Acts, 1857, Adj. Sess. p. 397) would an appeal lie to the circuit court from an order of the county court sustaining or overruling a motion to set aside or vacate a former order of the county court approving the location of the seat of justice. *Id.*

3. An appeal will lie from an order of a probate court revoking letters of administration; the appeal will not, however, operate a suspension of the effect of the order. *Harney* v. *Scott*, 333.

ARBITRATION.

1. An award, to be capable of enforcement according to the provisions of the act concerning arbitrations, must be in writing and made upon a written submission; a parol submission and award will, however, be valid and binding if the subject matter of the controversy is such that a parol agreement in respect to it would be valid, and the award made is of such a character that the party in whose favor it is made has a remedy to compel its performance; in such case the award may be pleaded in bar of a suit on the original cause of action. *Hamlin* v. *Duke*, 166.

ASSIGNMENTS.

See CONVEYANCE. FRAUD AND FRAUDULENT CONVEYANCES. PATENT RIGHT.

ATTACHMENT.

1. Where, in St. Louis county, a levy of an execution or attachment is made upon personal property, a person other than the defendant in such execution or attachment, claiming the property so levied on, has a choice of remedies. He may make claim to the property in accordance with the third section of the local act of March 3, 1855, (Sess. Acts, 1855, p. 464); in which case, if the sheriff or other officer demands and receives a *sufficient* indemnification bond from the plaintiff in the execution or attachment, the claimant will have no remedy against the officer but must resort to a suit on the indemnification bond. Should the claimant, however, not make claim in the manner provided in said section, he may maintain an action against the sheriff or other officer for the possession of the property levied on. *Bradley* v. *Holloway*, 150.
2. A sheriff or other officer levying an execution or attachment is not authorized, under said act of March 3, 1855, to demand an indemnification bond of the plaintiff in the execution or attachment unless claim is made to the property levied on substantially as provided in the third section of said act. *Id.*
3. The constructive fraud against creditors, which exists where it is understood between the grantor in a deed of trust conveying a stock of goods and the *cestui que trust* that the former is to remain in possession and continue to sell in the ordinary course of business, is sufficient to support an attachment under the seventh clause of the first section of the attachment act. *Reed* v. *Pelletier*, 173.

ATTACHMENT—(*Continued.*)

4. Foreign incorporated insurance companies, which have established agencies within this state, and whose agents have complied with the provisions of the act licensing and regulating agencies of foreign insurance companies (R. C. 1855, p. 884), are subject to garnishment process. *McAllister* v. *Pennsylvania Insurance Co.*, 214; *Same* v. *Commonwealth Insurance Co.*, 214.
5. Service of garnishment process may be had in such case upon the authorized agent of the foreign insurance company, he being a chief or managing officer thereof within the meaning of the twenty-sixth section of the first article of the attachment act. *Id.*
6. A. delivered to B. 300 barrels of cement on storage. B. gave to A. a receipt acknowledging the delivery of said cement on storage for C. and stating that it was to be delivered upon return of said receipt endorsed by C. This receipt A. delivered to C., and C. gave to A. an instrument in writing stating that he received and held it as security for the payment of a promissory note drawn in his favor by A. He also thereby engaged to deliver said receipt up to A. or his order upon payment of said note. D. instituted a suit by attachment against A. and summoned C. as garnishee. Afterwards C. instituted a suit against B. to recover the value of the cement which B. had refused to deliver to C. on the presentation of the above receipt. After the institution of this suit against B. but before C. had filed his answer to the interrogatories in the attachment suit, A. paid to C. the promissory note for which the warehouse receipt above mentioned was held as a security, and A. gave to B. the instrument in writing above mentioned signed by C., with an order endorsed thereon by A. for the delivery to B. of the receipt given by B. C. answered the interrogatories in the attachment suit, setting forth the facts above stated, the institution of the suit against B., and the payment of the promissory note by A. He further stated in his answer that whatever judgment he should obtain against B. would be the amount in his hands belonging to A. Judgment was rendered in the attachment suit against C., the garnishee. *Held*, that, as C. held the cement merely by way of security, and the debt for which it was so held had been paid, C. was not entitled to recover in the suit against B. more than the costs of suit. *Miller* v. *Mitchell*, 304.
7. Should the objection be taken, at the trial of an issue raised by an interplea in an attachment, that the interpleader only claims the attached property as *cestui que trust*, he should be permitted to substitute his trustee as plaintiff in the interplea. *Winkelmeier* v. *Weaver*, 358.
8. If the plaintiff in an attachment suit file an insufficient bond, he has the right to file another. *Wood* v. *Squires*, 528.
9. In an attachment suit commenced in the names of the members of the firm of "Wood, Bacon & Co.," the attachment bond purported to be the bond of "Wood, Bacon & Co." as principals and "Northup & Co." as securities, and was signed thus—"Wood, Bacon & Co. [seal], by their attorney, P. S. Brown [seal]; Northup & Co., by H. M. Northup [seal]"—*held*, that the attachment bond was not a nullity and should not be treated as such. *Id.*

ATTACHMENT—(*Continued.*)

10. Where an attachment is based upon two grounds, and the plaintiff establishes one of them, it can not avail the defendant any thing to show that the other ground of attachment has no basis. *Tucker* v. *Frederick*, 574.
11. Declarations of the defendant in the attachment made after the attachment are inadmissible in his favor to explain away the effect of previous declarations. *Id.*
12. In a suit upon a promissory note, if the defendant be personally served with process, he must answer the petition on or before the second day of the term at which he is bound to appear. (R. C. 1855, p. 1235, § 24.) This rule applies where an attachment is sued out in aid of such suit, in case there has been service of the writ of attachment in time for judgment at such term. *Farrington* v. *McDonald*, 581.

ATTORNEY AT LAW.

1. A. was appointed attorney for a bank for a term of two years. His compensation as such attorney was three per cent. upon all collections made by him in the county in which the bank was located, and five per cent. upon all collections made out of said county. During his term of office, he obtained judgment in favor of the bank upon a claim deposited in his hand for collection. *Held*, that he was entitled to his three per cent. commission on the amount recovered, whether he received the money on the judgment during his term of office or not. *State, to use, &c.*, v. *Hawkins*, 366.
2. An attorney of record in a cause is authorized to receive payment of a judgment recovered therein. Those dealing with such an attorney will not be affected by any arrangements entered into by him with his client, or by a revocation of his authority of which they have no notice. *Id.*

AUCTIONS.

See BOONVILLE.

AWARD.

See ARBITRATION.

B

BAIL.

See RECOGNIZANCE.

BAILMENT.

See COMMON CARRIER.

1. Where property is bailed to a partnership, one partner can not absolve himself from liability to a bailor, without the latter's consent, by retiring from the firm. Where, however, property is not bailed for any definite time, but the bailor may take the same away at any time, a retiring partner may give notice to the bailor of his retiring and may require him to take away the bailed property; if the bailor should then permit it to remain after the expiration of a reasonable time, he must

BAILMENT—(*Continued.*)

look to the remaining partners; the retiring partner would be absolved from liability for loss occurring after his retirement. *Winston* v. *Taylor*, 82.

2. A slave was placed in a private jail-yard for safe keeping. The bailor at the time knew, through occasional visits to the yard, that a negro boy watched at the door of the enclosure and opened the same for purposes of ingress and egress. *Held*, that this fact would not, in an action to recover damages for the escape of the slave through negligence on the part of the jailor, prevent the bailor from complaining of the trust reposed in the negro boy as an act of negligence. *Russell* v. *Lynch*, 312.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See CONFLICT OF LAWS. BOATS AND VESSELS, 4.

1. It will be presumed that the drawer of a bill of exchange has a right to draw on the drawee thereof until the contrary be shown; if the payee or holder seeks to recover of the drawer in a case where no presentment has been made, it will devolve on him to show that the drawer had no funds in the hands of the drawee and no right to draw on him; it will not be sufficient to show that the drawer withdrew his funds after the maturity of the bill. *Adams* v. *Darby & Barksdale*, 162.
2. Whenever it is incumbent upon the holder of a bill to make presentment thereof, and he neglects to do so, he will lose not only his remedy upon the bill, but also upon the consideration or debt in respect of which it was given or transferred. *Id.*
3. A promissory note may be transferred by delivery for a valuable consideration without endorsement or written assignment so as to enable the assignee to maintain an action thereon in his own name. *Boeka* v. *Nuella*, 180.
4. In an action in the nature of an action of trover for the conversion of a promissory note, the measure of damages, *prima facie*, is the amount called for on the face of the note. *Bredow* v. *Mutual Savings Institution*, 181.
5. The third section of the act of 1855 concerning bonds, notes and accounts (R. C. 1855, p. 322), allowing the obligor or maker of a non-negotiable promissory note every just set-off against the assignor existing at the time of the assignment unless it is expressed in the note that it is "for value received, negotiable and payable without defalcation," is not applicable to notes executed before the revised code of 1855 went into effect and made payable "without defalcation or discount," although assigned after said code went into effect. *Paston* v. *Bussmeyer*, 330.
6. Where the endorser of a negotiable promissory note resides within the town or city where protest thereof is made, notice of protest must be served upon him personally, or it must be left at his place of abode or of business; if, however, his residence is outside the city limits, though near the same, and though his address is the city post-office, it is sufficient if notice of protest be deposited, directed to him, in the city post-office. *Barret* v. *Evans*, 331.

BILLS OF EXCHANGE AND PROMISSORY NOTES—(*Continued.*)

7. The notary who presents and protests a bill of exchange for nonpayment is authorized to give notice to the various parties to the bill. *Renick & Peterson* v. *Robbins*, 339.
8. No particular form of notice is required; it is sufficient if the words employed, either in express terms or by necessary implication, give identity to the bill and information that it has not been accepted or paid upon due presentment. *Id.*
9. Upon the protest for *non acceptance* of a sight bill of exchange entitled to days of grace and the giving of notices to the drawer and endorsers, their liability to the holder is immediately fixed; it is not necessary that the bill should be presented for payment on the last day of grace. *Lucas* v. *Ladew*, 342.
10. Although days of grace upon sight bills have been abolished by statute in this state, it will be presumed, in the absence of proof of change by legislative enactments, that the common law, allowing days of grace upon such bills, is the law of a sister state or a territory of the United States. *Id.*
11. Where the obligation to pay a promissory note is made dependent upon the performance by the payee thereof of a condition contained in a collateral agreement entered into between the payee and the maker, and the maker of the note waives the performance of the condition, his obligation becomes fixed and complete. *West* v. *Best*, 551.
12. Where a mature negotiable promissory note is delivered by the payee without endorsement to an agent for collection, the possession of the note by the latter will not raise a presumption that he has authority to assign the same; the burden of proving an assignment by authority of the payee rests upon the party claiming under such alleged assignment. *Hardesty* v. *Newby*, 567.
13. A person to whom a negotiable promissory note has been endorsed may maintain an action thereon in his own name, although it was endorsed to him merely for collection. In a suit on such a note by an endorsee the caption of the petition was as follows: "A., to the use of B., plaintiff, v. C., defendant." In the body of the petition the plaintiff alleged title in himself by endorsement from B. *Held*, that the words in the caption "to the use of B." might be regarded as mere surplusage. *Beattie* v. *Lett*, 596.
14. A., the payee of a non-negotiable promissory note, endorsed the same in blank and delivered the same to B. in satisfaction of a debt due B. *Held*, that B. might recover in an action in his own name against the maker without having an assignment written above the endorsement. *Bennett* v. *Pound*, 598.
15. An action can be maintained in the name of a holder of a non-negotiable promissory note transferred merely by delivery. *Id.*

BILL OF LADING.

See COMMON CARRIER.

BILL OF PEACE.

See EQUITY, 5.

BOATS AND VESSELS.

See COMMON CARRIER.

1. As a general rule the master of a steamboat navigating the rivers of the west has authority to hire pilots and other subordinate officers for the whole of a boating season; such contracts, in the absence of any limitation upon the master's general authority by custom or otherwise, would be binding upon the owner. *Hight* v. *Robbins*, 168.
2. A. was employed as a fireman on a steamboat for a trip from St Louis to New Orleans and back at certain agreed wages per month; after the steamboat had proceeded a short way on her trip to New Orleans, A. was discharged and put ashore without cause; the trip lasted twenty-seven days, during which A. obtained employment elsewhere for about eight or nine days. *Held*, that A.'s claim to relief might be enforced by suit against the boat to recover wages for the trip; that this claim was a lien on the boat and might be enforced as such in an action under the act concerning boats and vessels; that A. might recover wages up to the completion of the trip, deducting any wages he may in the mean time have earned on any other boat. *Grant* v. *Steamboat Maria Denning*, 280.
3. Where a hand, employed on a steamboat for a trip at certain agreed wages per month, is, without cause, discharged before the termination of the trip, he may recover compensation at the agreed wages for a trip of the usual length; if the trip should be extended by accident beyond the usual period, he could not recover full wages for the whole time including the accidental detention. *Cunningham* v. *Steamboat Low-water*, 338.
4. The master of a steamboat has no authority, as master, to bind the boat or its owners by a promissory note. *Gregg* v. *Robbins*, 347.
5. The master or clerk of a boat can not enforce a claim for wages due for services rendered on board thereof by a proceeding *in rem* under the boat and vessel act. (R. C. 1855, p. 303.) *Lancaster* v. *Woodboat Hardin*, 351.
6. This rule applies to the "foreman" of a woodboat acting in the capacity of master. *Id.*

BOND.

See AGREEMENT. SHERIFF.

BOONVILLE.

1. The mayor and board of councilmen of the city of Boonville have power, under the charter of said city, by ordinance to provide for "licensing, taxing and regulating auctions;" they may prohibit persons from exercising the business of auctioneers without license by such fines and penalties as they may think proper, although the same should exceed ninety dollars. *Willis* v. *City of Boonville*, 543.
2. The mayor of the city of Boonville has jurisdiction over all cases arising under the charter and the ordinances of said city, although they should involve the assessment of a fine or penalty exceeding ninety dollars. *Id.*

BRIDGES.

See MECHANICS' LIENS.

BURDEN OF PROOF.

See EVIDENCE.

C

CALDWELL COUNTY.

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CARE.

See COMMON CARRIER. BAILMENT.

1. A slave was placed in a private jail-yard for safe keeping. The bailor at the time knew, through occasional visits to the yard, that a negro boy watched at the door of the enclosure and opened the same for purposes of ingress and egress. *Held*, that this fact would not, in an action to recover damages for the escape of the slave through negligence on the part of the jailor, prevent the bailor from complaining of the trust reposed in the negro boy as an act of negligence. *Russell* v. *Lynch*, 312.

CARONDELET.

1. Under the act of incorporation of March 1, 1851, (Sess. Acts, 1851, p. 139,) the city of Carondelet had power to sell and dispose of its school lands; the purchaser was under no obligation to see to the application of the purchase money. She might convey a portion of her school lands in exchange for and by way of compromise of an adverse claim to land embraced within her survey of common. Third persons could not dispute the validity of such an exchange on the ground that Carondelet had thereby committed a breach of its obligation to appropriate the school lands and their proceeds to the use of schools. *Bowlin* v. *Furman*, 427.
2. A conveyance by Carondelet by quit-claim deed of a portion of its school lands is valid and operative although at the date thereof there was no survey or assignment by the United States for the use of schools; to sustain a conveyance made before such assignment it is not necessary to invoke the doctrine of the enurement of after-acquired titles. *Id.*

CHANCERY PRACTICE.

See PRACTICE, 34.

CHANGE OF VENUE.

See CRIMES AND PUNISHMENTS, 6.

CHARTER.

See BOONVILLE. CARONDELET. CORPORATION. RAILROADS.

CITY OF ST. LOUIS.

1. The inspector of the fire department of the city of St. Louis had power, under the thirteenth section of the ordinance establishing and regu-

CITY OF ST. LOUIS—(*Continued.*)

lating the fire department, approved April 5, 1856, (Rev. Ord. 434,) to order and contract for repairs of engine houses, where the repairs ordered amounted to more than fifty dollars; a contract for repairs made by him as inspector, though not made in the name of the city of St. Louis, would be binding upon her. *Robinson* v. *City of St. Louis*, 488.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

See ATTACHMENT. EXECUTION. SHERIFF.

1. To maintain an action for the possession of specific personal property, the plaintiff must be the owner, or be entitled to the possession, of the specific property claimed. *Pilkington* v. *Trigg*, 95.
2. A. purchased certain property of B. and gave to the latter in payment therefor drafts on St. Louis; these drafts B. delivered to C., a banker, for collection; C. received payment of the same and placed the amount collected to the credit of B. *Held*, that A. could not, in an action for the recovery of specific personal property, recover the amount so collected by C. on the ground that he had been induced to make said purchase by fraudulent representations on the part of B.; nor could such an action be maintained, although C. should, after its commencement, separate from the general mass of moneys in his possession the amount so collected for B. and should place the same in a bag marked "A. or B." *Id.*
3. The St. Louis law commissioner's court has jurisdiction of an action for the possession of specific personal property in which the value of the property claimed is alleged to be one hundred and fifty dollars and the damages claimed for the detention are fifty dollars; it is the value of the property claimed that determines the jurisdiction. *Annis* v. *Bigney*, 247.
4. Where, in an action for the possession of personal property, the plaintiff gives bond and receives possession of the property, and the cause is tried by a jury, the jury, regularly, in case of finding for the defendant, should assess the *value* of the property, as also the damages. *Hohenthal* v. *Watson*, 360.
5. Where a sheriff in St. Louis county levies an execution upon personal property, a third person claiming the same may maintain an action against the sheriff for its possession without making claim thereto in accordance with the third section of the local act of March 3, 1855. (Sess. Acts, 1855, p. 464.) *St. Louis, Alton & Chicago Railroad Co.* v. *Castello*, 379.
6. A sheriff, under an execution against A., levied upon a lot of gold and silver and copper coins and paper currency belonging to B.; B., with a view to facilitate the institution of a suit by himself to test his title, substituted, in the hands of the sheriff, for the property levied on, bank bills of large denomination, the exchange being made by him and the sheriff under the understanding that suit would be brought by B. for the possession of the bank bills thus substituted. *Held*, that B. might, under such circumstances, maintain an action against the sheriff for the possession of the bank bills. *Id.*

CLAIM AND DELIVERY OF PERSONAL PROPERTY—(*Continued.*)

7. Where, in St. Louis county, a levy of an execution or attachment is made upon personal property, a person other than the defendant in such execution or attachment, claiming the property so levied on, has a choice of remedies. He may make claim to the property in accordance with the third section of the local act of March 3, 1855, (Sess. Acts, 1855, p. 464); in which case, if the sheriff or other officer demands and receives a *sufficient* indemnification bond from the plaintiff in the execution or attachment, the claimant will have no remedy against the officer but must resort to a suit on the indemnification bond. Should the claimant, however, not make claim in the manner provided in said section, he may maintain an action against the sheriff or other officer for the possession of the property levied on. *Bradley* v. *Holloway*, 150.

CLERKS.

See COUNTY COURTS. COSTS. FEES.

COMMISSIONERS.

1. Where a public act requiring the exercise of judgment is to be performed by several commissioners appointed in a statute, all of them must meet and confer. *Wood* v. *Phelps County Court*, 119.
2. Though a majority of the commissioners appointed by the act organizing Phelps county (Sess. Acts, 1857, Adj. Sess. p. 397) may make a location of a seat of justice, yet all the commissioners appointed must meet and confer with respect to such location. *Id.*

COMMON CARRIER.

1 In an action against a carrier to recover damages for his failure to trans port goods to their place of destination, if the owner seeks to recover the value of the goods at the place of destination, the freight that would have been earned by the carrier in transporting the goods to their place of destination must be taken into estimation and allowed the carrier. *Atkison* v. *Steamboat Castle Garden*, 124.
2. If a carrier deliver goods at their place of destination after the appointed time, the acceptance of them by the owner will not discharge the carrier from liability for the breach of his contract; so the acceptance of goods from a carrier at a place short of their place of destination will not absolve him from liability for a breach of his contract committed before delivery; in such cases, the carrier is exempt from damages only where there has been no breach of the contract previous to the delivery of the goods. *Id.*
3. If a consignee refuse to receive the goods consigned to him, it is the duty of the carrier to take such steps in relation to the goods as will advance the owner's interest and purposes consistently with a reasonable security to himself for his freight and charges; what he ought to do in a given case will depend upon circumstances; if, acting as agent for the owners, he pursues such course as men of ordinary prudence would follow, he will be protected by the law whatever may be the result. *Steamboat Keystone* v. *Moies*, 243.

COMMON CARRIER—*(Continued.)*

4. A custom among steamboat carriers to return goods to the shipper if the consignee should refuse to receive them, and to charge freight upon the return trip as well as upon the out-going trip, would seem to be unreasonable if applied to all kinds and qualities of goods shipped. *Id.*
5. A common carrier is an insurer of goods entrusted to him for transportation; if loss or damage occur, he is liable unless he shows affirmatively that it happened by reason of some one of the excepted perils. The onus being upon the carrier, he will not be discharged from liability by showing that the navigation was difficult or dangerous, or that he employed skillful or competent persons to control and manage the boat; he must show that the loss occurred in a manner and for a cause that will acquit him. *Hill* v. *Sturgeon & Rawlings*, 323.
6. The words "dangers of the river, &c.," in a bill of lading, mean only the natural accidents incident to river navigation, and do not embrace such as may be avoided by the exercise of the skill, judgment and foresight demanded of the carrier. *Id.*
7. If at the time of a disaster and consequent damage or loss of goods in charge of a carrier, he is guilty of some delinquency—as by having an incompetent pilot in charge of the boat—if such delinquency *might* have contributed to the disaster or *might* have had an agency in producing it, he will be liable; he may, however, show by way of defence that the disaster *must* have occurred although the delinquency had never existed. *Id.*
8. A pilot, who is acquainted with the place of a disaster and with the character for skill of the pilot or steersman in charge of the boat at the time of the disaster, may testify as to whether it was prudent to allow the latter to pilot the boat at the time of the accident. *Id.*
9. A clause in a bill of lading given in behalf of a steamboat for goods shipped on a barge, to the effect that the steamboat and owners "insure the freight shipped on the barge against leaking and sinking," is intended to insure only the seaworthiness of the barge. *Id.*

CONDITIONS.

See RAILROADS. BILLS OF EXCHANGE AND PROMISSORY NOTES.

CONFESSIONS.

See EVIDENCE. CRIMES AND PUNISHMENTS.

CONFESSION OF JUDGMENT.

See JUDGMENT BY CONFESSION.

CONFLICT OF LAWS.

See JUDGMENTS OF SISTER STATES. WILLS AND TESTAMENTS, 4, 5.

1. A. and B. gave to C. their joint promissory note dated and payable at the city of New York. By the law of the state of New York at the date of the note, upon the recovery of a judgment against one of two joint debtors there was a merger of the debt and no action could afterwards be maintained against the other joint debtors. C. instituted suit upon said promissory note in the state of Louisiana against A. alone, and recovered judgment. *Held*, that this judgment against A. was no

CONFLICT OF LAWS—(*Continued.*)

bar to an action on the note against B. alone in the courts of this state. *Wiley* v. *Holmes*, 286.

2. Although days of grace upon sight bills of exchange have been abolished by statute in this state, it will be presumed, in the absence of proof of change by legislative enactments, that the common law, allowing days of grace upon such bills, is the law of a sister state or a territory of the United States. *Lucas* v. *Ladew*, 342.
3. A judgment obtained in a sister state upon notice to the defendant by publication only, there being no appearance of the defendant, will be deemed null and void outside the state in which it is rendered. *Winston* v. *Taylor*, 82.

CONSIDERATION.

See AGREEMENT. VENDORS AND PURCHASERS.

CONSIGNEE.

See COMMON CARRIER.

CONSTABLE.

See SHERIFF. EXECUTION.

CONSTITUTIONAL LAW.

See SEATS OF JUSTICES. GROCERS' LICENSE. RAILROAD.

1. The legislature of the former territory of Missouri had no power by legislative act to grant divorces. (Per NAPTON, Judge; SCOTT, Judge, not concurring, holding that the territorial legislature had such power.) *Chouteau* v. *Magenis*, 187.
2. The act of the general assembly of January 21, 1857, (Sess. Acts, 1857, p. 746,) directing the county court of Caldwell county to audit and allow one W. F. Boggs, for services rendered in making an index of deeds and mortgages of record in said county at the rate of ten cents for each name, and to draw their warrant in favor of said Boggs for the sum thus ascertained to be due, and declaring that it shall be the duty of the county treasurer to pay said warrant out of any money appropriated for county expenditures, is unconstitutional and void. *Boggs* v. *Caldwell County*, 586.
3. The act regulating dram-shops, approved December 13, 1855, (R. C. 1855, p. 683) and the act to tax and license merchants, approved December 11, 1855 (R. C. 1855, p. 1077, § 22,) did not affect the validity of an unexpired grocer's license granted previous to May 1, 1856. *State* v. *Andrews*, 14.

CONSTRUCTION.

See AGREEMENT. CONVEYANCE. COMMON CARRIER. COVENANT. DAMAGES.

CONTINUANCE.

1. Where an application is made for a continuance on the ground of the absence of a material witness, it must appear from the accompanying affidavit that the applicant had used due diligence to procure the testimony of such absentee. *Cline* & *Jamison* v. *Brainard*, 341.

CONTRIBUTION.

See WILLS AND TESTAMENTS, 6.

CONVEYANCE.

See COVENANT. VENDORS AND PURCHASERS.

1. A. and B. made an exchange of lands, each party agreeing to pay one-third of all taxes for the year assessed upon the land sold by him to the other, and two-thirds of the taxes assessed upon the land bought by him from the other. A. paid to B. the proportional share of the taxes agreed upon. B. did the same. Among the taxes assessed against the land sold by A. to B. was a railroad tax. This tax A. was by law exempted from paying by reason of his being a stockholder of a railroad company. He did not actually pay said tax, but, in his account with the collector, he was credited with the amount of the railroad tax by reason of his having previously paid his subscription of stock to an equal amount. At the time B. made his payment to A. of the agreed proportional share of the taxes, he did not know that A. was a stockholder and therefore exempt from paying the railroad tax, and that he had not actually paid it. *Held*, that B. was not entitled to recover back the two-thirds of the railroad tax paid by him to A. *Labarge* v. *Renshaw*, 363.
2. A call in a deed for a boundary certainly ascertained will prevail over a call for distance. *Whittelsey* v. *Kellogg*, 404.
3. The construction of deeds is a matter for the court and not for the jury; though it is the province of the jury to determine *where* the boundaries called for in a deed are located, it is the province and duty of the court to declare *what* the boundaries are that control the location. *Id.*
4. Although a witness, a surveyor, should be improperly permitted to give his opinion upon a matter of law, as to declare what are the controlling calls of a deed, a judgment will not be reversed for this impropriety, if the opinion given be substantially correct and such as can not have prejudiced the party complaining of it. *Id.*
5. *Quere*, how far is a deed of trust conveying a stock of goods in trade and also all goods and stock that may belong to the grantor during the continuance of the trust valid and operative? *Hall* v. *Webb*, 408.
6. The proviso of the act of June 22, 1821, (1 Terr. Laws, 756,) to the effect that nothing therein contained should "in anywise authorize husband and wife to convey [any] estate granted to the wife and heirs after intermarriage" does not apply to a confirmation, by the act of Congress of June 13, 1812, of a Spanish concession or claim cast upon the wife by descent previous to her marriage; nor does said proviso apply to the case of an inheritance by a wife during marriage of such a confirmation; husband and wife might, under said act of June 22, 1821, convey land thus confirmed to the wife during marriage, or thus falling to her by inheritance. *Garnier* v. *Barry*, 438.
7. The second section of the act of December 6, 1821, (1 Terr. Laws, 798,) was applicable to a conveyance by husband and wife of the latter's real estate under the act of June 22, 1821; consequently, such a

CONVEYANCE—(*Continued.*)

conveyance was not entitled to be admitted to record unless the certificate of acknowledgment contained the requisites prescribed by the said second section of the act of December 6, 1821. It was necessary that the certificate should state that the persons making the acknowledgment were personally known to the person taking the same, or were proved by two credible witnesses, whose names were mentioned therein, to be the proper persons who made and executed the deed. *Id.*

8. The fifty-eighth section of the act concerning evidence (R. C. 1855, p. 733) is not, it seems, applicable to the case of the record of a deed of a married woman defectively acknowledged; a certified copy of the record of such a deed and of the time of its record, though accompanied with proof of claim and enjoyment under such deed for ten consecutive years, would not, under said section, be *primâ facie* evidence of its execution and genuineness. *Id.*
9. A. and B., husband and wife, on the 10th of December, 1823, executed a conveyance of land belonging to the wife. The acknowledgment was taken on the same day before a county court, which was composed of at least three judges, and certificate thereof was in the following form: "Be it remembered, that on, &c., appeared in open court A. and B., his wife, and acknowledged the foregoing deed of conveyance from them to L. A. B. to be their voluntary act and deed for the purposes therein expressed; she, the said B., being privily and apart from her said husband examined, declared that she did freely and willingly seal and deliver the said writing and wished not to retract, and she being previously made acquainted with the contents thereof." This acknowledgment was attested by the presiding justice under the seal of the court. *Held*, that this acknowledgment was sufficient to pass the title of the wife under the act of June 22, 1821; (1 Terr. Laws, p. 756;) the certificate of acknowledgment was not, however, sufficiently in conformity to the second section of the act of December 6, 1821, (id. p. 798,) to authorize its admission to record. *Id.*
10. The act of February 14, 1825, (R. C. 1825, p. 220, § 12,) regulating conveyances, required a married woman, making an acknowledgment of a deed of conveyance of her estate, to "appear before some court of record." In a certificate of acknowledgment taken before a judge of a probate court, and certified by him, he having no clerk, it was stated as follows: "At a *term* of the probate court for, &c., before me, M. P. L., judge of said court, personally appeared M. G., wife, &c., who is personally known," &c. *Held*, that the acknowledgment was good. *Id.*
11. The intention of the parties to a deed, as shown by the entire deed, should govern in its construction; where certain of the words used appear repugnant to the other portions of the deed and to the general intention of the parties, they should be rejected. *Gibson* v. *Bogy*, 478.
12. A call for a monument in a deed, as for a "public road," will be controlled by the other calls therein, if it be apparent that it was inadvertently inserted. *Id.*
13. To render an assignment of a patent right or of an undivided part

CONVEYANCE—(*Continued.*)

thereof valid, it is not necessary that it should be recorded in the United States patent office; the assignee will have a vendible interest without such record. *Sone* v. *Palmer*, 539.

14. Where A. conveys land to B. and B. gives his notes for the purchase money, and, there being doubts as to A.'s title, both parties enter into an agreement that unless A. within a reasonable time make good title to the land, the notes should become void and B. should restore the land to A., and A. sues B. on the promissory notes; *held*, that the question whether A. had made good the title to the land within the meaning of the agreement is a question of law for the court. *West* v. *Best*, 551.
15. A justice of the peace can not take the acknowledgment of a married woman of a deed conveying her real estate; the acknowledgment must be taken by some court having a seal, or some judge, justice or clerk thereof. *Id.*
16. A worm fence is a part of the freehold and passes along with the land upon which it is built. *Climer* v. *Wallace*, 556.
17. Where two adjoining proprietors agree to put up a partition fence between them, each to own that portion of the fence put up by himself, and the fence built by one is mistakenly located upon the land of the other, and the latter sells his tract to a person who has no notice of the agreement as to the ownership of the fence, such purchaser will take the fence so located upon his land. *Climer* v. *Wallace*, 556.
18. The corners established by the United States surveyors in surveying the public lands are conclusive as to the actual location of the boundary lines of sections and such subdivisions thereof as are authorized by the laws of the United States; it can not be shown that the United States surveyors mistakenly located such corners. *Id.*

CORPORATIONS.

See CARONDELET. BOONVILLE. RAILROADS. JURISDICTION. CITY OF ST. LOUIS.

1. In a suit against a corporation, a stockholder thereof is a competent witness in behalf of the corporation. (Barclay v. Globe Mutual Insurance Co. 26 Mo. 490, affirmed.) *Bredow* v. *Mutual Savings Institution*, 181.
2. Foreign incorporated insurance companies, which have established agencies within this state, and whose agents have complied with the provisions of the act licensing and regulating agencies of foreign insurance companies (R. C. 1855, p. 884), are subject to garnishment process. *McAllister* v. *Pennsylvania Insurance Co.*, 214; *Same* v. *Commonwealth Insurance Co.*, 214.
3. Service of garnishment process may be had in such case upon the authorized agent of the foreign insurance company, he being a chief or managing officer thereof within the meaning of the twenty-sixth section of the first article of the attachment act. *Id.*
4. Where an instrument purporting to be the act of a corporation has the common seal of the corporation attached, and the signatures of the proper officers are proved, it will be presumed that such officers had au-

CORPORATIONS—(*Continued.*)

thority from the corporation to execute the same. *St. Louis Public Schools* v.. *Risley*, 415.

5. The secretary of the board of directors of the St. Louis Public Schools is a proper person to whom to deliver applications for renewal of leases made by said board with covenants of renewal. The declarations of a deceased secretary, made when applied to in behalf of an applicant for renewal before the expiration of the time within which demand of renewal should be made, are admissible in evidence to show that the application for renewal had been received by him as secretary in due time. *Blackmore* v. *Boardman*, 420.
6. Where a deed, purporting to be the deed of a corporation, is admitted, and no objection is made to its introduction on the ground that the corporate seal has not been proved, this objection will not be entertained in the supreme court. *Chouquette* v. *Barada*, 491.
7. Where an instrument purporting to be the act of a corporation has the common seal of the corporation attached, and has been signed by the proper officer it will be presumed that it was executed by authority of the corporation. *Id.*
8. Justices of the peace have jurisdiction of actions brought against railroad corporations under the twelfth section of the general railroad act. (R. C. 1855, p. 414.) *Mooney* v. *Hannibal & St. Joseph Railroad Co.*, 570.

COSTS.

See Fees. Security for Costs.

1. A special adjourned session of a court, although it may with propriety be said to be a continuance of the regular term, since its object is the completion of the business of the regular term, is a separate and distinct term of the court. Should such a special adjourned term be appointed and a cause be continued thereat at the cost of the party applying for such continuance, this order, properly construed, would embrace the costs of such adjourned term only and not those of the previous regular term. *Dulle* v. *Deimler*, 583.
2. Should the clerk in such case, in issuing execution for costs, include the costs of the regular term, the court may at a subsequent term order a retaxation of the costs. *Id.*
3. Where a suit results adversely to the plaintiff and he becomes liable for costs and judgment is rendered accordingly, it is no error as against him that judgment for costs is also rendered against another irregularly made a party to the suit at the instance of the defendant. *Dickerson* v. *Chrisman*, 134.

COUNTY COURTS.

See Roads and Highways, 1, 2. Seats of Justice.

1. A justice of a county court is not authorized to let to bail a person indicted for a bailable offence unless the indictment is pending in his county. *State* v. *Nelson*, 13.
2. A county court has the power to order an index to be made to the books in which deeds are recorded and to allow a reasonable compensation therefor out of the county funds. *Boggs* v. *Caldwell County*, 586.

COUNTY COURTS—(*Continued.*)

3. In order that such an order may be valid and binding upon the county, it is not, it seems, necessary that it should be entered of record. A verbal direction from the justices on the bench or from the presiding justice would be sufficient. *Id.*
4. At the May term, 1857, of the Caldwell county court an account was presented for allowance against the county. The account was disallowed. At the March term, 1858, by leave of court, testimony touching the same account was introduced. The court having heard the testimony, "adhered to its former decision." An appeal was then taken to the circuit court. *Held,* that the appeal was well taken; that the rejection of the claim at the May term, 1857, was not like a judgment in a suit between individuals which the court could not open at a subsequent term; that the county court could waive an advantage the county might have. *Id.*
5. The act of the general assembly of January 21, 1857, (Sess. Acts, 1857, p. 746,) directing the county court of Caldwell county to audit and allow one W. F. Boggs, for services rendered in making an index of deeds and mortgages of record in said county at the rate of ten cents for each name, and to draw their warrant in favor of said Boggs for the sum thus ascertained to be due, and declaring that it shall be the duty of the county treasurer to pay said warrant out of any money appropriated for county expenditures, is unconstitutional and void. *Id.*

COURT.

1. A special adjourned session of a court, although it may with propriety be said to be a continuance of the regular term, since its object is the completion of the business of the regular term, is a separate and distinct term of the court. Should such a special adjourned term be appointed and a cause be continued thereat at the cost of the party applying for such continuance, this order, properly construed, would embrace the costs of such adjourned term only and not those of the previous regular term. *Dulle* v. *Deimler,* 583.
2. Should the clerk in such case, in issuing execution for costs, include the costs of the regular term, the court may at a subsequent term order a re-taxation of the costs. *Id.*

COVENANT.

1. The word "lease" as an operative word in an instrument of lease imports and contains a covenant for quiet enjoyment as well as the words "grant and demise." (SCOTT, J., dissenting.) *Hamilton* v. *Wright's Adm'r,* 199.
2. Such implied covenant runs with the land. *Id.*
3. A., a tenant for life only of certain real estate but possessed of a full power to dispose thereof by appointment by will, leased the same to B. for a term of ten years. A. died before the expiration of said term without having attempted to protect the tenant by exercising the power of appointment, and the tenant was evicted by the remainder man. *Held,* that B. might maintain an action against A.'s administra-

COVENANT—(*Continued.*)

tor to recover damages for a breach of the covenant implied from the word "lease" in the instrument of lease. *Id.*

4. A covenant for perpetual renewal of a lease is valid. *Blackmore* v. *Boardman.*
5. A covenant for renewal of a lease is an incident to the lease and will pass by an assignment of the unexpired term; a sale by the sheriff under an execution of the interest of the lessee in the land will pass to the purchaser the covenant for renewal. *Id.*

CRIMES AND PUNISHMENTS.

See GROCER'S LICENSE.

1. A justice of a county court is not authorized to let to bail a person indicted for a bailable offence unless the indictment is pending in his county. *State* v. *Nelson*, 13.
2. An indictment, founded on section 8 of the eighth article of the act concerning crimes and punishments (R. C. 1855, p. 624), charging the defendant with an open and notorious act of public indecency, grossly scandalous by "exhibiting and exposing his private parts in presence of *a male and female*, at," &c., is sufficient. *State* v. *Gardner*, 90.
3. To render a voluntary confession, made by an accused person before a committing magistrate and reduced to writing by the latter, admissible in evidence on the trial, it is not necessary that the record of the proceedings of the magistrate should show specifically that the prisoner was distinctly informed of the charge made against him and that he was at liberty to refuse to answer any question put to him, and that a reasonable time was allowed the prisoner to advise with his counsel and for that purpose to send for counsel; it is sufficient if it be shown upon the trial, by the testimony of the committing magistrate, that the requirements of the statute in this regard had been complied with. *State* v. *Lamb*, 218.
4. A judicial confession is sufficient to found a capital conviction upon, although uncorroborated by any independent proof of the *corpus delicti*. *Id.*
5. An extra-judicial confession, with extrinsic circumstantial evidence satisfying the minds of a jury beyond a reasonable doubt that the crime charged has been committed, will warrant a conviction, although the dead body may not have been discovered and seen so that its existence and identity can be testified to by an eye-witness. *Id.*
6. The St. Louis criminal court has power, of its own motion, to order a removal of a cause to the St. Louis circuit court on the ground that the judge of the said criminal court has been of counsel for the defendant; the local act of December 11, 1855, (R. C. 1855, p. 1591,) is confined to changes of venue made upon the application of the defendant. *State* v. *Houser*, 232.
7. Where an instruction given by the court could have had no influence on the verdict—there being no evidence upon which to ground it—an inquiry into its propriety as an abstract proposition of law will not be held obligatory on the supreme court. *Id.*

CRIMES AND PUNISHMENTS—(*Continued.*)

8. Where it is sought to show the presence of the defendant at the time and place of the homicide by showing the identity of a shirt, with marks of blood upon it, found at the place of the homicide on the morning after its commission, with a shirt worn by the defendant on the day of the homicide, the fact, testified to by the person, a relative of defendant, at whose house the homicide was committed, that she gave the shirt up to the brother of the defendant on his demand, is evidence tending to show the real opinion of the witness as to the question of identity and ownership of the shirt—she having stated that when she gave the shirt to the brother she told him that she did not think it belonged to the accused. *Id.*
9. The fact that a slung-shot was discovered in the pocket of a person on trial for a capital crime when about to be brought into court to be present at the rendition of the verdict is admissible in evidence against the accused on a second trial. *Id.*
10. When a slave is cruelly or inhumanly abused by a person who does not have such slave in his employment or under his charge, power or control, resort can not be had, in the punishment of such an offence, to an indictment founded on the forty-eighth section of the eighth article of the act concerning crimes and punishments. (R. C. 1855, p. 634.) *State* v. *Peters*, 241.
11. A. was indicted for stealing certain cattle alleged in the indictment to be the property of B. At the trial, one C., who had been summoned as a juror, stated, upon his *voir dire*, that he knew the cattle alleged to have been stolen; that his brother had once owned them, and had sold them to one K., who had sold them to B. *Held*—the allegation as to B.'s ownership not being controverted on the trial—that C. was a competent juror. *State* v. *Martin*, 530.
12. Although cattle may have wandered away from the owner's enclosure, and the owner may not know where they are, yet if another coming across them drives them off and converts them feloniously to his own use, he is none the less guilty of larceny because he is ignorant of their true owner and their owner may not know where they are; the ownership draws along with it the possession under such circumstances. *Id.*
13. Where declarations or statements made by an accused person are admitted in evidence against him, he has a right to insist that the whole of his statements and not a portion merely shall go before a jury; what credit shall be attached to the whole, or any part thereof, is a matter exclusively for the jury. *Id.*
14. A druggist who, in good faith, sells intoxicating liquor, whisky, for medical purposes, can not be rendered liable to an indictment for selling liquor in a less quantity than a gallon; he is not required to institute a strict inquisition into the motives and objects of the persons dealing with him. *State* v. *Mitchell*, 562.
15. A dealer in drugs and medicines is a merchant within the meaning of the first section of the act to tax and license merchants. (R. C. 1855, p. 1072.) *State* v. *Wells*, 565.

CRIMES AND PUNISHMENTS—*(Continued.)*

16. To constitute a merchant a dealer in drugs and medicines within the meaning of the twenty-second section of the act to tax and license merchants (R. C. 1855, p. 1077) so as to authorize him, under his license as a merchant, to sell spirituous liquors in any quantity when it is used only for medical purposes, it is necessary that he should be engaged principally in selling drugs and medicines, though he may incidentally admit into his store and may vend articles not strictly falling under the denomination of drugs and medicines. *Id.*
17. A general verdict against a defendant in a criminal case will authorize a judgment thereon if there is a single good count in the indictment. *State* v. *Montgomery*, 594.
18. It is competent in a criminal case, as affecting the credibility of a witness, to inquire into the state of his feelings towards the party against whom he is called upon to testify; this inquiry can not, however, be made concerning the witness' feeling towards the husband of such party. *Id.*
19. In an indictment founded on the fifteenth section of the second article of the revenue act of 1857, (Sess. Acts, 1857, Adj. Sess. p. 79,) for delivering to the assessor a false and fraudulent list of taxable property, it must appear in what respect the list delivered is false and fraudulent; the indictment must set out, in terms of general description at least, the taxable property owned by the defendant and fraudulently omitted in the list delivered. *State* v. *Welch*, 600.

CUSTOM.

See COMMON CARRIER.

D

DAMAGES.

See ATTACHMENT, 6.

1. Whether a sum stipulated to be paid in case of the breach of the provisions of a contract is to be regarded as a penalty or as liquidated damages must be determined by the nature of the contract and its provisions; if the whole scope of the instrument shows that it is stipulated for as a penalty the parties can not constitute it liquidated damages by designating and stipulating for it as such. *Basye* v. *Ambrose*, 39.
2. Where the agreement secures the performance or omission of various acts which are not measurable by any exact pecuniary standard, together with one or more acts in respect of which the damages on a breach of covenant are readily ascertainable by a jury, and there is a sum stipulated for as damages for a breach of any one of the covenants, such sum is a penalty merely. *Id.*
3. In actions founded on the "act to prevent certain trespasses," (R. C. 1845, p. 1068,) the jury can assess single damages only; the jury should assess the value of the property taken or injured; the court will then, if a proper case be made out, give judgment for treble the amount so assessed. *Brewster* v. *Link*, 147.

DAMAGES—*(Continued.)*

4. The question of "probable cause" is in such cases to be determined by the court. *Id.*
5. Where the petition contains counts under the statute and at common law, and the jury render a general verdict, the court is not authorized to treble the damages. *Id.*
6. Relief against penalties will not be afforded at the instance of the persons in whose behalf the penalties are stipulated for. *Stillwell* v. *Temple*, 156.
7. A. leased a dwelling-house to B. for one year. A. stipulated in the contract of lease that he would at any time during the year sell and convey the premises to B. on certain specified terms. B. covenanted that he would during the term demand a conveyance and comply with the conditions of sale. It was further agreed as follows: "Upon the completion of said sale and purchase as and in the manner aforesaid, said lease and rent shall cease; and to secure the faithful payment of said rent and making of said purchase as and in the manner aforesaid, the said B., has assigned unto said A. his right and title to three hundred shares of the capital stock of the St. L. & B. Mining Company, now owned by him, which shall become the absolute property of said A. without redemption, and as and for liquidated damages and not as a penalty, in case said B. should fail faithfully to pay said rent and make said purchase when and in the manner aforesaid; but upon such faithful performance the stock shall revert and be reassigned to him." B. failed to pay the rent or to make the purchase as agreed. A. brought suit against B. to recover one year's rent of the premises and damages for the failure of B. to purchase the premises; he did not offer to return the stock mentioned in the contract or to give credit for its value. *Held*, that A. was not entitled to recover; that the stipulation with respect to stock, whether regarded as a penalty or as stipulated damages, was a bar to such recovery. *Id.*
8. In an action in the nature of an action of trover for the conversion of a promissory note, the measure of damages, *prima facie*, is the amount called for on the face of the note. *Bredow* v. *Mutual Savings Institution*, 181.
9. Where a hand, employed on a steamboat for a trip at certain agreed wages per month, is, without cause, discharged before the termination of the trip, he may recover compensation at the agreed wages for a trip of the usual length; if the trip should be extended by accident beyond the usual period, he could not recover full wages for the whole time including the accidental detention. *Cunningham* v. *Steamboat Low-water*, 338.
10. Where, in an action for the possession of personal property, the plaintiff gives bond and receives possession of the property, and the cause is tried by a jury, the jury, regularly, in case of finding for the defendant, should assess the *value* of the property, as also the damages. *Hohenthal* v. *Watson*, 360.
11. In an action of ejectment for the recovery of leasehold premises, the plaintiff can not recover by way of damages the rents and profits beyond the time of the expiration of his title. *Gutzweiler* v. *Lachman*, 434.

DANGERS OF THE RIVER.

See COMMON CARRIER.

DEALER IN DRUGS AND MEDICINES.

See MERCHANT'S LICENSE.

DEEDS OF TRUST.

See EQUITY. FRAUD AND FRAUDULENT CONVEYANCES. CONVEYANCES.

DEPOSITIONS.

1. A notice to take depositions that is unsigned is insufficient; depositions taken upon such a notice, the opposite party not attending, either in person or by attorney, at the time and place specified in the notice, may be suppressed. *Bohn* v. *Devlin*, 319.
2. When either party to a cause offers to read a deposition taken therein, he must read the whole of it, except such portions, if any, as are ruled out by the court as inadmissible. *Hill* v. *Sturgeon & Raulings*, 323.

DILIGENCE.

See CARE.

DIVORCE.

1. The conduct of a husband toward a wife may be such as to warrant her in leaving him, although it would not entitle her to a divorce; if her absence be caused by his misconduct, or if he place himself in such a situation as to prevent her return, he will not be entitled to a divorce, although she may have lived separate from him for a number of years. *Gillinwaters* v. *Gillinwaters*, 60.
2. It does not follow as a matter of course that the party prevailing in a suit for a divorce shall have the care and custody of the children; the court may, in its discretion, if the good of the children require it, grant the care and custody of them to the other parent. *Lusk* v. *Lusk*, 91.
3. The legislature of the former territory of Missouri had no power by legislative act to grant divorces. (Per NAPTON, Judge; SCOTT, Judge, not concurring, holding that the territorial legislature had such power.) *Chouteau* v. *Magenis*, 187.

DOWER.

1. Where a father gives money to his married daughter, though not to her separate use, and the husband purchases land therewith in his own name, such land will be deemed to have come to the husband in right of the marriage within the meaning of the third section of the dower act of 1845, (R. C. 1845, p. 430, § 3,) and if it remain undisposed of at the death of the husband, the widow will be entitled to it. *Cason* v. *Cason*, 47.
2. To entitle a widow to dower under the third section of the dower act of 1845 (R. C. 1845, p. 430), it was necessary that she should make her election so to take in the mode prescribed by the seventh section of said act; otherwise she would be entitled to dower under the first section. *Welch* v. *Anderson*, 293.
3. The right of the widow in such case to elect is strictly personal; it is not transmissible by descent. *Id.*

DOWER—*(Continued.)*

4. The widow and the heirs may, by agreement and without a formal election by the widow, determine the kind and quantity of estate she shall take as dower. *Id.*
5. To entitle a widow to dower under the first section of the dower act (R. C. 1855, p. 668), it is not necessary that she should elect so to take. No election to take dower under the first section of the act can, as an election, take away her right to elect to be endowed under the eleventh section of said act. To overthrow this right, there must be a binding contract or such facts and circumstances as will work an estoppel *in pais*. *Watson* v. *Watson*, 300.
6. The institution of a suit by a widow to recover dower according to the first section of the dower act, and the declaration in the petition in such suit, which is signed and sworn to by her, that she thereby elects to take as her dower the third part of the lands of the deceased husband, will not take away her right to elect, within eighteen months after the grant of letters testamentary or of administration, to take dower under the eleventh section of said dower act. *Id.*

DRAM-SHOPS.

1. Under an indictment, founded on the act, approved December 13, 1855, regulating dram-shops, (R. C. 1855, p. 682,) charging that the defendant unlawfully sold a quantity of spirituous liquor, to-wit, one pint of whisky, without having a dram-shop keeper's license or any other authority for that purpose; it might be shown that the defendant sold a quantity of whisky less than a pint; it would not be a fatal variance. *State* v. *Andrews*, 17.
2. The act regulating dram-shops, approved December 13, 1855, (R. C. 1855, p. 683) and the act to tax and license merchants, approved December 11, 1855 (R. C. 1855, p. 1077, § 22,) did not affect the validity of an unexpired grocer's license granted previous to May 1, 1856. *State* v. *Andrews*, 14.
3. The revised code of 1855 repealed the third section of the act of March 25, 1845, (R. C. 1845, p. 542); consequently a grocer, under an unexpired license granted previous to May 1, 1856, might permit intoxicating liquor sold by him after May 1, 1856, to be drank at a place under his control. *Id.*

DRUGS AND MEDICINES.

See MERCHANT'S LICENSE.

DURESS.

1. Courts of equity will set aside deeds obtained by duress. *Bray* v. *Thatcher*, 129.

E

EJECTMENT.

See LANDS AND LAND TITLES. CONVEYANCE.

1. If the plaintiff in an action of ejectment fail at the trial to establish his right to a recovery upon the title relied on by him, he may resort to

EJECTMENT—(*Continued.*)

another title; it is improper to require him to elect one of two titles, upon which he announces his purpose to rely, as that upon which he must base his right to a recovery, even though such titles be inconsistent with each other. *St. Louis Public Schools* v. *Risley*, 415.

2. In an action of ejectment for the recovery of leasehold premises, the plaintiff can not recover by way of damages the rents and profits beyond the time of the expiration of his title. *Gutzweiler* v. *Lachman*, 434.

ELECTION.

See DOWER. EJECTMENT.

ELECTIONS.

1. Where an inferior judicial tribunal declines to hear a cause upon what is termed a preliminary objection—as where, in a statutory proceeding instituted to contest the election of a sheriff, the court refuses to try the cause upon the merits but dismisses the same and quashes the proceedings on the ground that the contestant had not given the notice required by the statute—a mandamus will lie from the supreme court commanding the inferior court to reinstate the cause upon its docket and proceed to try the same, if such court had misconstrued the law in such preliminary matter. (SCOTT, Judge, dissenting.) *Castello* v. *St. Louis Circuit Court*, 259.
2. In proceedings instituted under the act regulating elections to contest the election of a sheriff, the contestant must, as required by the fifty-fifth section of said act, give notice in writing within twenty days after the votes are officially counted; the essential constituents of the notice in such case are set forth in the fiftieth section of said act; only one notice is contemplated or required. *Id.*
3. Should the contestant not give the required notice, the court should quash the proceedings. *Id.*

EQUITY.

See PRACTICE, 34, 35. FRAUD AND FRAUDULENT CONVEYANCES. JUSTICES' COURTS. SLAVERY, 2. PRACTICE, 10. RESULTING TRUSTS. CARONDELET. PARTITION. LANDS AND LAND TITLES.

1. If one comes into the possession of trust property, whether by suit or otherwise, he will hold it in trust for the *cestui que trust*. *Coffee's Administratrix* v. *Crouch*, 106.
2. S. & R. were partners. A. was security for S. for $804; R. was also security for S. for $695. S., to secure A. and R. against these liabilities, executed to A. and R. a mortgage of his interest in the partnership effects, consisting of lands, goods, accounts, &c., with authority in A. or R. or either of them to take possession, and, in the event of default of payment of the secured debts by S., to apply the property or its proceeds to their payment. R. at the same time gave to A. a separate obligation in writing by which he stipulated that the debt for which A. was bound should be first paid out of the mortgaged property, and also gave him verbal assurances that the property was amply sufficient for

EQUITY—(*Continued.*)

this purpose. R. took sole possession of the mortgaged property, but paid no portion of the debt for which A. was security; he did pay off a portion of the debt for which he, R., was security, and refuses to render any account of the partnership. S. is insolvent. *Held*, in a suit instituted by A. against R. and S. for the purpose of obtaining a due appropriation and management of the mortgaged property, that S. was properly joined as a party defendant to such suit; that it was not necessary, in order to enable A. to maintain such suit, that he should first pay off the debt for which he was security; it was sufficient if there was reason to apprehend a misappropriation of the mortgaged property or its conversion to uses other than those provided for in the mortgaged deed; that it constituted no legal impediment in the way of the maintenance of such a suit by A. that he had acquiesced in the exclusive possession and management of the property by R.; that R. having taken possession of the property and entered upon the discharge of the trust imposed upon him by the mortgage and his agreement with A., neither he nor S. could set up that the mortgage was void for uncertainty in the description of the property. *Anthony* v. *Ray & Somerville*, 109.

3. Courts of equity will set aside deeds obtained by duress. *Bray* v. *Thatcher*, 129.
4. Relief against penalties will not be afforded at the instance of the persons in whose behalf the penalties are stipulated for. *Stillwell* v. *Temple*, 156.
5. A bill of peace to restrain a person from instituting ejectment suits against another, on the ground that such suits would be vexatious, can not be maintained unless the title to the land in dispute has been fully and satisfactorily litigated at law; the institution of repeated ejectment suits, if the same are abandoned before trial, can not furnish a foundation for the maintenance of a bill of peace to restrain vexatious litigation. *Patterson* v. *McCamant*, 210.
6. Where in a partition suit a sale of the premises is ordered, and previous to the sale it is agreed between certain parties in interest that one of their number shall bid off the property at such sale unless it brings a certain price, and hold it for the benefit of the parties to the agreement and such others of those interested as may choose to become parties thereto, and that the others shall abstain from bidding at such sale, and he does purchase the property under such agreement; *held*, that he will hold it in trust for all the parties in interest. *Northcraft* v. *Martin*, 469.
7. Where a party purchasing land causes the legal title to be placed in a third person with a view to defraud his creditors, there will be a resulting trust to himself for the benefit of such creditors, and this interest may be seized and sold on execution under a judgment against him in favor of one of those creditors; the purchaser may then, in a proceeding for that purpose, and upon establishing the alleged fraud, have a decree vesting the legal title in himself and for the possession of the land. *Dunnica* v. *Coy*, 525.

EQUITY—(*Continued.*)

8. A. conveyed to B. a slave in trust to secure and indemnify the latter against loss by reason of his being security for A. B. acting under a power in the deed of trust sold said slave to C., taking a bond to himself "as trustee of A." for a portion of the purchase money. The slave was afterwards taken from the possession of C. by the true owner from whom A. had stolen him. *Held*, that there was a failure of consideration of the bond, and payment thereof could not be enforced against C. *Long* v. *Gilliam*, 560.
9. Should a testator, by reason of a failure to name or provide for some of his children in his will, be deemed in law to have died intestate as to those not named, they can not maintain against the devisees an action for the partition of the property embraced in the devise; resort must be had to a petition for contribution, in which the equities arising out of advancements may be adjusted. *Hill* v. *Martin*, 78.

ESTOPPEL.

See DOWER.

1. When the record proper of a cause shows that a demurrer to a petition has been regularly heard, considered and overruled, the objection will not be entertained in the supreme court that the court overruled the demurrer without hearing counsel. *The State, to use, &c.*, v. *Sanger*, 314.

EVIDENCE.

See FRAUD AND FRAUDULENT CONVEYANCES, 3. AGREEMENT, 5.

1. Under an indictment, founded on the act, approved December 13, 1855, regulating dram-shops, (R. C. 1855, p. 682,) charging that the defendant unlawfully sold a quantity of spirituous liquor, to-wit, one pint of whisky, without having a dram-shop keeper's license or any other authority for that purpose; it might be shown that the defendant sold a quantity of whisky less than a pint; it would not be a fatal variance. *State* v. *Andrews*, 17.
2. In a statutory proceeding to contest the validity of a will, the burden of proof rests upon the defendants; consequently they have the right to open and close the case to the jury. *Cravens* v. *Falconer*, 19.
3. A defendant can not be permitted to introduce evidence to support a defence to the action not set up in his answer. *Winston* v. *Taylor*, 82.
4. Mere hearsay testimony, the acts and declarations of third persons in no way related to the party against whom it is sought to use them, is inadmissible. *Atkison* v. *Steamboat Castle Garden*, 124.
5. Where a deposition is offered in evidence, and its admission is objected to for various reasons, if the objection that the absence of the witness has not been accounted for be not made, it will be deemed to have been waived. *Dickerson* v. *Chrisman*, 134.
6. Declarations of a grantor of real estate, made before the grant, to the effect that he had previously sold said real estate to another, are admissible in evidence against such grantee and all persons claiming under him. *Id.*

EVIDENCE—(*Continued.*)

7. In a suit against a corporation, a stockholder thereof is a competent witness in behalf of the corporation. (Barclay v. Globe Mutual Insurance Co. 26 Mo. 490, affirmed.) *Bredow* v. *Mutual Savings Institution*, 181.
8. To render a voluntary confession, made by an accused person before a committing magistrate and reduced to writing by the latter, admissible in evidence on the trial, it is not necessary that the record of the proceedings of the magistrate should show specifically that the prisoner was distinctly informed of the charge made against him and that he was at liberty to refuse to answer any question put to him, and that a reasonable time was allowed the prisoner to advise with his counsel and for that purpose to send for counsel; it is sufficient if it be shown upon the trial, by the testimony of the committing magistrate, that the requirements of the statute in this regard had been complied with. *State* v. *Lamb*, 218.
9. A judicial confession is sufficient to found a capital conviction upon, although uncorroborated by any independent proof of the *corpus delicti*. *Id.*
10. An extra-judicial confession, with extrinsic circumstantial evidence satisfying the minds of a jury beyond a reasonable doubt that the crime charged has been committed, will warrant a conviction, although the dead body may not have been discovered and seen so that its existence and identity can be testified to by an eye-witness. *Id.*
11. Where it is sought to show the presence of the defendant at the time and place of the homicide by showing the identity of a shirt, with marks of blood upon it, found at the place of the homicide on the morning after its commission, with a shirt worn by the defendant on the day of the homicide, the fact, testified to by the person, a relative of defendant, at whose house the homicide was committed, that she gave the shirt up to the brother of the defendant on his demand, is evidence tending to show the real opinion of the witness as to the question of identity and ownership of the shirt—she having stated that when she gave the shirt to the brother she told him that she did not think it belonged to the accused. *State* v. *Houser*, 233.
12. The fact that a slung-shot was discovered in the pocket of a person on trial for a capital crime when about to be brought into court to be present at the rendition of the verdict is admissible in evidence against the accused on a second trial. *Id.*
13. The mode of authenticating the laws and records of the different states prescribed by the laws of the United States, is not exclusive of the common law modes of proving the same; thus, where the general banking law of a sister state requires articles of association entered into in pursuance thereof to be recorded and makes a duly certified copy of the record evidence, a sworn copy of such record is admissible in the courts of this state. *Karr* v. *Jackson*, 316.
14. A pilot, who is acquainted with the place of a steamboat disaster and with the character for skill of the pilot or steersman in charge of the boat at the time of the disaster, may testify as to whether it was pru-

EVIDENCE—(*Continued.*)

dent to allow the latter to pilot the boat at the time of the accident. *Hill* v. *Sturgeon & Rawlings*, 323.

15. When either party to a cause offers to read a deposition taken therein, he must read the whole of it, except such portions, if any, as are ruled out by the court as inadmissible. *Id.*
16. The cause of action set forth in a petition must be supported by the evidence, otherwise there will be a fatal variance. *Gregg* v. *Robbins*, 347.
17. A defendant should not be permitted to introduce evidence to support a defence not set up in his answer. *Lynch* v. *Morrow's Adm'r*, 357.
18. Where a presumption is one of fact merely, a court is not warranted in declaring it to the jury as a presumption raised by law. *Ham* v. *Barret*, 388.
19. The presumption of the payment of a debt, arising from the fact that a subsequent demand due on the same account and arising from the same cause has been regularly discharged, is a presumption of fact. *Id.*
20. Although a witness, a surveyor, should be improperly permitted to give his opinion upon a matter of law, as to declare what are the controlling calls of a deed, a judgment will not be reversed for this impropriety, if the opinion given be substantially correct and such as can not have prejudiced the party complaining of it. *Whittelsey* v. *Kellogg*, 404.
21. Where an instrument purporting to be the act of a corporation has the common seal of the corporation attached, and the signatures of the proper officers are proved, it will be presumed that such officers had authority from the corporation to execute the same. *St. Louis Public Schools* v. *Risley*, 415.
22. The secretary of the board of directors of the St. Louis Public Schools is a proper person to whom to deliver applications for renewal of leases made by said board with covenants of renewal. The declarations of a deceased secretary, made when applied to in behalf of an applicant for renewal before the expiration of the time within which demand of renewal should be made, are admissible in evidence to show that the application for renewal had been received by him as secretary in due time. *Blackmore* v. *Boardman*, 420.
23. The fifty-eighth section of the act concerning evidence (R. C. 1855, p. 733) is not, it seems, applicable to the case of the record of a deed defectively acknowledged; a certified copy of the record of such a deed and of the time of its record, though accompanied with proof of claim and enjoyment under such deed for ten consecutive years, would not, under said section, be *prima facie* evidence of its execution and genuineness. *Garnier* v. *Barry*, 438.
24. Hunt's minutes of testimony taken by the act of Congress of May 26, 1824, are not admissible in evidence except to prove such facts as may be proved by hearsay. If professedly admitted to prove such facts, care should be taken that they are not used for other and illegal purposes. *Williams* v. *Carpenter*, 453.
25. Where a deed, purporting to be the deed of a corporation, is admitted,

EVIDENCE—*(Continued.)*

and no objection is made to its introduction on the ground that the corporate seal has not been proved, this objection will not be entertained in the supreme court. *Chouquette* v. *Barada*, 491.

26. Where an instrument purporting to be the act of a corporation has the common seal of the corporation attached, and has been signed by the proper officer, it will be presumed that it was executed by authority of the corporation. *Id.*
27. The certificates of confirmation issued by Recorder Hunt under the act of Congress of May 26, 1824, are *prima facie* evidence of title by virtue of the act of Congress of June 13, 1812, as against persons claiming by title emanating from the United States in the year 1820. *Milburn* v. *Hardy*, 514.
28. So also surveys by the United States of the lots embraced in the certificates issued by Recorder Hunt under said act of May 26, 1824, are admissible in evidence as against persons claiming by titles acquired from the United States prior to the passage of said act of May 26, 1824. *Id.*
29. Hearsay testimony is inadmissible in evidence. *State* v. *Martin*, 530.
30. Where declarations or statements made by an accused person are admitted in evidence against him, he has a right to insist that the whole of his statements and not a portion merely shall go before a jury; what credit shall be attached to the whole, or any part thereof, is a matter exclusively for the jury. *Id.*
31. A clerk in the patent office, whose employment consists chiefly in making examinations in relation to assignments and other papers recorded and filed in the office, is a competent witness to prove what documents are of record or on file in said patent office. *Sone* v. *Palmer*, 539.
32. Declarations of the defendant in the attachment made after the attachment are inadmissible in his favor to explain away the effect of previous declarations. *Tucker* v. *Frederick*, 574.

EXECUTION.

See SHERIFF. CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. When the defendant in an execution is not a resident of the county in which the land sought to be sold is situated, the plaintiff in the execution should give notice to the defendant of the issuing of the same as required by section 46 of the act regulating executions. (R. C. 1855, p. 766, § 46.) Should no such notice be given, and property be levied on and sold under the execution, the defendant may on the return day of the execution move the court to set aside such sale, and the court should set aside the same although the sheriff may have executed the deed to the purchaser before the return day of the execution. *Ray* v. *Stobbs*, 35.
2. Where, in St. Louis county, a levy of an execution or attachment is made upon personal property, a person other than the defendant in such execution or attachment, claiming the property so levied on, has a choice of remedies. He may make claim to the property in accordance with the third section of the local act of March 3, 1855, (Sess.

EXECUTION—(*Continued.*)

Acts, 1855, p. 464); in which case, if the sheriff or other officer demands and receives a *sufficient* indemnification bond from the plaintiff in the execution or attachment, the claimant will have no remedy against the officer but must resort to a suit on the indemnification bond. Should the claimant, however, not make claim in the manner provided in said section, he may maintain an action against the sheriff or other officer for the possession of the property levied on. *Bradley* v. *Holloway*, 150.

3. A sheriff or other officer levying an execution or attachment is not authorized, under said act of March 3, 1855, to demand an indemnification bond of the plaintiff in the execution or attachment unless claim is made to the property levied on substantially as provided in the third section of said act. *Bradley* v. *Holloway*, 150.
4. If a levy of an execution be made upon property not belonging to the defendant therein and such execution returned satisfied to the amount made by the execution sale, should the plaintiff in the execution be compelled to refund to the true owner the amount received by him from such sale, he will be entitled to have the satisfaction endorsed on the execution set aside and to have an execution issue for the full amount of the judgment. *Magwire* v. *Marks*, 193.
5. A. recovered a judgment against B. Execution was issued thereon and levied by order of A.—he giving the plaintiff an indemnification bond—on certain personal property in possession of B. but known by A. to be claimed by C. as trustee for the wife of B. The sheriff made sale of the property levied on, and the amount made was endorsed on the execution in *pro tanto* satisfaction thereof. C. sued the sheriff and recovered judgment against him for the amount made by said levy and sale, with interest, which was paid by A. *Held*, that A. was entitled to have the sheriff's return vacated and set aside so far as it stated a partial satisfaction of the execution, to have the same amended in accordance with the facts, and to have an execution issue for the whole amount of the judgment. *Id.*
6. Where a sheriff receives a writ of execution and does not levy the same during his term of office, it is his duty, at the expiration of his term, to deliver said writ to his successor in office, whose duty it is to receive and execute the same. *Dunnica* v. *Coy*, 525.

F

FEES.

1. The fees of the clerks of the county courts for services rendered by them under the revenue act of Nov. 23, 1857, (Sess. Acts, Adj. Sess. 1857, p. 75,) are regulated by that act and not by the act of 1855 concerning fees. The clerks are entitled to receive five cents per hundred words and figures for making out and copying the tax books, abstract books, lists and all papers required to be copied or made out under said act of Nov. 23, 1857. *Harris* v. *Buffington*, 53.

FIRE INSPECTOR.

See CITY OF ST. LOUIS.

FIXTURES.

1. By the general law, if a tenant make erections and improvements upon the leased land and so connect the same with buildings already erected that they can not be separated or removed without material injury to the landlord's property, such erections or structures will be deemed in law fixtures as against such tenant, and he can not remove the same. *Powell* v. *McAshan*, 70.

FORCIBLE ENTRY AND DETAINER.

1. Where a tenant, after the termination of the time for which the premises are demised to him, willfully holds over, no demand in writing is necessary to enable the landlord to maintain an action for unlawful detainer against him. *Young* v. *Smith*, 65.
2. Where the term of a tenant is to end at a time certain, no notice to quit is necessary, whether the term is for less or more than a year. *Id.*
3. To authorize the maintenance of an action for unlawful detainer, it is not necessary that the plaintiff should have been in the possession of the premises; a grantee can maintain such action if his grantor could. *Id.*

FOREIGN CORPORATION.

See ATTACHMENT. CORPORATION. INSURANCE.

FRAUD AND FRAUDULENT CONVEYANCES.

See EQUITY. STATUTE OF FRAUDS.

1. A judgment procured by fraud should be set aside at the instance of the party against whom it was rendered. *Miles* v. *Jones*, 87.
2. In order that fraudulent representations made by a vendor to a vendee with respect to the character of the improvements upon the land sold may be the basis of relief to the purchaser in an action by the vendor on a promissory note given for a portion of the purchase money, it must appear that the misrepresentations were made with respect to something material and constituting an inducement to the contract. *Hodges* v. *Torrey*, 99.
3. A. conveyed a stock of goods in trust to secure certain notes in favor of B. In the deed it was stipulated that the property conveyed should remain in the possession of A. until the maturity of the notes secured, when, if they were not paid, the trustee might take possession and sell. A. remained in possession and continued to sell in the usual course of business. C., a creditor of A., sued out an attachment against A. on the ground that he had fraudulently conveyed and assigned his property so as to hinder and delay his creditors. *Held*, that the declarations of B., (he not being a party to the suit and being a competent witness for either party and not shown to have conspired with A.,) made in the absence of A., to the effect that A. had the right to sell the goods embraced in the deed of trust in the ordinary course of business, were inadmissible in evidence. *Reed* v. *Pelletier*, 173.

FRAUD AND FRAUDULENT CONVEYANCES—(*Continued.*)

4. The constructive fraud against creditors, which exists where it is understood between the grantor in a deed of trust conveying a stock of goods and the *cestui que trust* that the former is to remain in possession and continue to sell in the ordinary course of business, is sufficient to support an attachment under the seventh clause of the first section of the attachment act. *Id.*
5. Where there is a reservation or limitation of personal property by way of condition, reservation or remainder, or otherwise, the same not being declared by will or deed duly proved or acknowledged and recorded, such reservation will not, by the operation of the fifth section of the act concerning fraudulent conveyances (R. C. 1855, p. 803), be rendered void as to the creditors and purchasers of the person in possession, unless such possession shall have continued for the space of five years. *Miller* v. *Bascomb*, 352.
6. Where personal property is sold and delivered to a person with the understanding that it is to remain the property of the vendor until the purchase money is paid, this "reservation or limitation" in favor of the vendor is not invalidated by the operation of the fifth section of the act concerning fraudulent conveyances, by reason of a failure to declare the same by will or deed duly proved or acknowledged and recorded; said section has no such operation unless possession has continued for five years. *Id.*
7. Layson v. Rogers, 24 Mo. 192, explained and modified. *Id.*
8. The mere fact, that the grantor in a deed of trust which is recorded remains in possession of the trust property, is no evidence of fraud; the record is in such case equivalent to a transmutation of possession. *Id.*
9. *Quere*, how far is a deed of trust conveying a stock of goods in trade and also all goods and stock that may belong to the grantor during the continuance of the trust valid and operative? *Hall* v. *Webb*, 408.
10. Where property is assigned for the benefit of creditors, and a sale is made by the trustee under such assignment, the fact, that a purchaser at such sale purchases the property for the benefit of the grantor in the deed of trust and with a view to permit him to enjoy the benefit of it, will not render the transaction void as to creditors; nor would it be rendered void by the fact that the purchase was made with the understanding that the grantor should have the privilege of redeeming on payment of the sum advanced. It would be otherwise if the purchase had been made with money furnished by the grantor in the deed of trust. *Gutzweiler* v. *Lachman*, 434.
11. Where a party purchasing land causes the legal title to be placed in a third person with a view to defraud his creditors, there will be a resulting trust to himself for the benefit of such creditors, and this interest may be seized and sold on execution under a judgment against him in favor of one of those creditors; the purchaser may then, in a proceeding for that purpose, and upon establishing the alleged fraud, have a decree vesting the legal title in himself and for the possession of the land. *Dunnica* v. *Coy*, 525.

FRAUD AND FRAUDULENT CONVEYANCES—(*Continued.*)

12. Whenever it appears from the face of an assignment of a stock of goods to a trustee for the benefit of certain designated creditors, that it is the intention of the parties thereto that the grantor shall be allowed to remain in possession of the property assigned, and to dispose of the same in the usual course of business until default, such deed of assignment is a conveyance in trust to the use of the grantor within the first section of the act concerning fraudulent conveyances, and consequently void as against creditors; it is sufficient to avoid the assignment that such appears, from a consideration of the whole instrument, to be the intent of the parties. (Stanley v. Bunce, 27 Mo. 269.) *Billingley's Adm'r* v. *Bunce*, 547.

FREEHOLD.

See CONVEYANCE, 16, 17.

G

GARNISHMENT.

See ATTACHMENT.

GRANTS TO RAILROADS.

See RAILROADS.

GROCER'S LICENSE.

See MERCHANT'S LICENSE.

1. The act regulating dram-shops, approved December 13, 1855, (R. C. 1855, p. 683) and the act to tax and license merchants, approved December 11, 1855 (R. C. 1855, p. 1077, § 22,) did not affect the validity of an unexpired grocer's license granted previous to May 1, 1856. *State* v. *Andrews*, 14.
2. The revised code of 1855 repealed the third section of the act of March 25, 1845, (R. C. 1845, p. 542); consequently a grocer, under an unexpired license granted previous to May 1, 1856, might permit intoxicating liquor sold by him after May 1, 1856, to be drank at a place under his control. *Id.*

GUARANTY.

See PLEADING, 3.

H

HUNT'S CERTIFICATES.

See LANDS AND LAND TITLES.

HUSBAND AND WIFE.

See DIVORCE. CONVEYANCE. DOWER.

1. Where a father gives money to his married daughter, though not to her separate use, and the husband purchases land therewith in his own name, such land will be deemed to have come to the husband in right

HUSBAND AND WIFE—(*Continued.*)

of the marriage within the meaning of the third section of the dower act of 1845, (R. C. 1845, p. 430, § 3,) and if it remain undisposed of at the death of the husband, the widow will be entitled to it. *Cason* v. *Cason*, 47.

2. The proviso of the act of June 22, 1821, (1 Terr. Laws, 756,) to the effect that nothing therein contained should "in anywise authorize husband and wife to convey [any] estate granted to the wife and heirs after intermarriage" does not apply to a confirmation, by the act of Congress of June 13, 1812, of a Spanish concession or claim cast upon the wife by descent previous to her marriage; nor does said proviso apply to the case of an inheritance by a wife during marriage of such a confirmation; husband and wife might, under said act of June 22, 1821, convey land thus confirmed to the wife during marriage, or thus falling to her by inheritance. *Garnier* v. *Barry*, 438.

I

IMPROVEMENT ON PUBLIC LANDS.

See AGREEMENT, 1.

INDEMNIFICATION BOND.

See SHERIFF. EXECUTION.

INDICTMENT.

See CRIMES AND PUNISHMENTS.

INJUNCTION.

1. A. let certain premises to B. for a term of years; the letting, being by parol, had the force and effect at law of a tenancy from year to year. A. gave B. due notice to quit, and brought his action of forcible detainer before a justice of the peace. B. relied for a defence upon the fact that he had entered upon said premises under a parol lease for ten years, while the building thereon was not completed, and had made improvements thereon, and had paid rent under said parol agreement. *Held*, that the justice of the peace had no jurisdiction to enforce the equities arising out of such a defence, and that, if the defendant was entitled to the specific enforcement of the parol agreement, he might have enjoined in a court of competent jurisdiction the proceedings before the justice until his equity could be determined. *Ridgley* v. *Stillwell*, 400.

INSTRUCTIONS.

See PRACTICE, 14, 40, 42.

INSURANCE.

1. Foreign incorporated insurance companies, which have established agencies within this state, and whose agents have complied with the provisions of the act licensing and regulating agencies of foreign insurance companies (R. C. 1855, p. 884), are subject to garnishment process.

INSURANCE—*(Continued.)*

McAllister v. *Pennsylvania Insurance Co.*, 214; *Same* v. *Commonwealth Insurance Co.*, 214.

2. Service of garnishment process may be had in such case upon the authorized agent of the foreign insurance company, he being a chief or managing officer thereof within the meaning of the twenty-sixth section of the first article of the attachment act. *Id.*
3. Should an insurance company wrongfully refuse to receive premiums due on a life policy, the assured may treat the policy at an end, and may recover back all the premiums paid under it. *McKee* v. *Phœnix Insurance Co.*, 383.
4. Where the life of a husband is insured for the benefit of the wife, the policy is not necessarily determined by the wife's obtaining a divorce from the husband; she may still have, it seems, an insurable interest in the life of the divorced husband that will support the policy. *Id.*

INTOXICATING LIQUOR.

See CRIMES AND PUNISHMENTS. MERCHANT'S LICENSE.

J

JUDGMENT.

See JURISDICTION. COUNTY COURTS.

1. A judgment procured by fraud should be set aside at the instance of the party against whom it was rendered. *Miles* v. *Jones*, 87.
2. The rule that a judgment is an entire thing, and if reversed as to one must be reversed as to all, is only applicable to judgments at law. *Dickerson* v. *Chrisman*, 134.

JUDGMENT BY CONFESSION.

1. A verified statement upon which a confession of judgment is rendered must state concisely the facts out of which the indebtedness arose. If it state the execution of a promissory note to the plaintiff; that "said note was given for goods, wares and merchandise sold by the plaintiff to the defendant before the date thereof," it will be materially defective. *Bryan* v. *Miller*, 32.
2. A judgment rendered upon such a statement, though not valid as to other judgment creditors, would be valid between the parties thereto. The defective statement might be amended, but not so as to affect rights of existing judgment creditors. *Id.*

JUDGMENTS OF SISTER STATES.

1. A judgment obtained in a sister state upon notice to the defendant by publication only, there being no appearance of the defendant, will be deemed null and void outside the state in which it is rendered. *Winston* v. *Taylor*, 82.
2. A. and B. gave to C. their joint promissory note dated and payable at the city of New York. By the law of the state of New York at the date of the note, upon the recovery of a judgment against one of two

JUDGMENTS OF SISTER STATES—(*Continued.*)

joint debtors there was a merger of the debt and no action could afterwards be maintained against the other joint debtors. C. instituted suit upon said promissory note in the state of Louisiana against A. alone, and recovered judgment. *Held*, that this judgment against A. was no bar to an action on the note against B. alone in the courts of this state. *Wiley* v. *Holmes*, 285.

JURISDICTION.

See JUSTICES' COURTS.

1. The Kansas city court of common pleas has no jurisdiction of actions to enforce mechanics' liens. *Ashburn* v. *Ayres*, 75; *Platt* v. *Smith*, 593.
2. Each court may control the execution of its own process. Should a court, in a suit for partition, order a sale of land situate in a county other than that in which the suit is pending, it may entertain a motion to set such sale aside on the ground of fraud on the part of the purchaser. *Kyte* v. *Plemmons*, 104.
3. Should, however, an original action be instituted to set aside such sale, it must be brought in the county in which the land is situated. *Id.*
4. The charter of the St. Louis and Iron Mountain Railroad Company did not confer upon a justice of the peace jurisdiction of an action against the company to recover damages for injuries sustained by reason of the construction of a culvert. *Fatchell* v. *St. Louis and Iron Mountain Railroad Co.*, 178.
5. The St. Louis law commissioner's court has jurisdiction of an action for the possession of specific personal property in which the value of the property claimed is alleged to be one hundred and fifty dollars and the damages claimed for the detention are fifty dollars; it is the value of the property claimed that determines the jurisdiction. *Annis* v. *Bigney*, 247.
6. Where in an action for partition a sale is made by the sheriff under the order of the court, the court may, at any time during the term to which the process issued to the sheriff is returnable, set aside such sale without notice to the purchasers thereat; the court has power to control the execution of its own process, and it is not essential to the exercise of this power that the purchasers should be notified. *Neiman* v. *Early*, 475.
7. The mayor of the city of Boonville has jurisdiction over all cases arising under the charter and the ordinances of said city, although they should involve the assessment of a fine or penalty exceeding ninety dollars. *Willis* v. *City of Boonville*, 543.
8. Justices of the peace have jurisdiction of actions brought against railroad corporations under the twelfth section of the general railroad act. (R. C. 1855, p. 414.) *Mooney* v. *Hannibal & St. Joseph Railroad Co.*, 570.
9. The Kansas city court of common pleas, established by the act of the general assembly approved November 20, 1855, (Sess. Acts, 1855, Adj. Sess. p. 60) does not possess probate jurisdiction. *Burke's Adm'rx* v. *Walroud*, 591.

JUROR.

1. A. was indicted for stealing certain cattle alleged in the indictment to be the property of B. At the trial, one C., who had been summoned as a juror, stated, upon his *voir dire*, that he knew the cattle alleged to have been stolen; that his brother had once owned them, and had sold them to one K., who had sold them to B. *Held*—the allegation as to B.'s ownership not being controverted on the trial—that C. was a competent juror. *State* v. *Martin*, 530.

JUSTICES' COURTS.

See COUNTY COURTS.

1. The charter of the St. Louis and Iron Mountain Railroad Company did not confer upon a justice of the peace jurisdiction of an action against the company to recover damages for injuries sustained by reason of the construction of a culvert. *Fatchel* v. *St. Louis & Iron Mountain Railroad Co.*, 178.
2. In summary proceedings under the landlord and tenant act of November 29, 1855, the summons issued by the justice and directed to the tenant must be executed at least five days before the return day thereof. (R. C. 1855, p. 1017, § 34.) *Hunt* v. *Cobb*, 198.
3. Should a justice of the peace in such a summary proceeding, in which less than five days' service of the summons has been had before the return day of the writ, render judgment of default against the defendant, and he should appeal, and should fail to prosecute his appeal with effect, the appellee would not be entitled to have the judgment affirmed by the appellate court upon his filing a transcript of the proceedings of the justice. (SCOTT, Judge, dissenting.) *Id.*
4. A justice of the peace rendered a judgment by default against a defendant, and allowed an appeal although the defendant made no motion to set the default aside, and the justice filed a transcript of his proceedings before the proper appellate tribunal. Afterwards, and within the time allowed by law, the defendant moved the justice to set aside the judgment by default; this motion the justice refused to entertain, as also a further application for an appeal. *Held*, that the defendant was entitled under these circumstances to have the cause tried upon the merits in the appellate court. *Dermody* v. *Steamboat Maria Denning*, 284; *Grant* v. *Same*, 284.
5. After a defendant in an action before a justice of the peace appears and consents to a continuance, it is too late to object to the jurisdiction of the justice on the ground that the defendant does not reside in the township in which the suit is brought. *Bohn* v. *Devlin*, 319.
6. Justices of the peace can not specifically enforce a parol contract concerning land on the ground that it has been taken out of the statute of frauds by part performance. *Ridgley* v. *Stillwell*, 400.
7. A. let certain premises to B. for a term of years; the letting, being by parol, had the force and effect at law of a tenancy from year to year. A. gave B. due notice to quit, and brought his action of forcible detainer before a justice of the peace. B. relied for a defence upon the

JUSTICES' COURTS—(*Continued.*)

fact that he had entered upon said premises under a parol lease for ten years, while the building thereon was not completed, and had made improvements thereon, and had paid rent under said parol agreement. *Held*, that the justice of the peace had no jurisdiction to enforce the equities arising out of such a defence, and that, if the defendant was entitled to the specific enforcement of the parol agreement, he might have enjoined in a court of competent jurisdiction the proceedings before the justice until his equity could be determined. *Id.*

8. A justice of the peace can not take the acknowledgment of a married woman of a deed conveying her real estate; the acknowledgment must be taken by some court having a seal, or some judge, justice or clerk thereof. *West* v. *Best*, 551.
9. Justices of the peace have jurisdiction of actions brought against railroad corporations under the twelfth section of the general railroad act. (R. C. 1855, p. 414,) *Mooney* v. *Hannibal & St. Joseph Railroad Co.*, 570.

K

KANSAS CITY COURT OF COMMON PLEAS.

1. The Kansas city court of common pleas has no jurisdiction of actions to enforce mechanics' liens. *Ashburn* v. *Ayres*, 75; *Platt* v. *Smith*, 593.
2. The Kansas city court of common pleas, established by the act of the general assembly approved November 20, 1855, (Sess. Acts, 1855, Adj. Sess. p. 60,) does not possess probate jurisdiction. *Burke's Adm'rx* v. *Walroud*, 591.

L

LANDLORD AND TENANT.

1. Where a tenant, after the termination of the time for which the premises are demised to him, willfully holds over, no demand in writing is necessary to enable the landlord to maintain an action for unlawful detainer against him. *Young* v. *Smith*, 65.
2. Where the term of a tenant is to end at a time certain, no notice to quit is necessary, whether the term is for less or more than a year. *Id.*
3. By the general law, if a tenant make erections and improvements upon the leased land and so connect the same with buildings already erected that they can not be separated or removed without material injury to the landlord's property, such erections or structures will be deemed in law fixtures as against such tenant, and he can not remove the same. *Powell* v. *McAshan*, 70.
4. An agreement on the part of the landlord, that the tenant may take off and carry away any and all buildings, sheds and other temporary houses and improvements he may erect, would not be construed to

LANDLORD AND TENANT—(*Continued.*)

authorize the taking away of erections, the removal of which would cause material injury to the property of the landlord. *Id.*

5. Such an agreement on the part of the landlord would be valid although oral; it would not be within the statute of frauds. *Id.*
6. In summary proceedings under the landlord and tenant act of November 29, 1855, the summons issued by the justice and directed to the tenant must be executed at least five days before the return day thereof. (R. C. 1855, p. 1017, § 34.) *Hunt* v. *Cobb*, 198.
7. Should a justice of the peace in such a summary proceeding, in which less than five days' service of the summons has been had before the return day of the writ, render judgment of default against the defendant, and he should appeal, and should fail to prosecute his appeal with effect, the appellee would not be entitled to have the judgment affirmed by the appellate court upon his filing a transcript of the proceedings of the justice. (SCOTT, Judge, dissenting.) *Id.*
8. The word "lease" as an operative word in an instrument of lease imports and contains a covenant for quiet enjoyment as well as the words "grant and demise." (SCOTT, J., dissenting.) *Hamilton* v. *Wright's Adm'r*, 199.
9. Such implied covenant runs with the land. *Id.*
10. A., a tenant for life only of certain real estate but possessed of a full power to dispose thereof by appointment by will, leased the same to B. for a term of ten years. A. died before the expiration of said term without having attempted to protect the tenant by exercising the power of appointment, and the tenant was evicted by the remainder man. *Held*, that B. might maintain an action against A.'s administrator to recover damages for a breach of the covenant implied from the word "lease" in the instrument of lease. *Id.*
11. A parol lease for a term of years has the force and effect of a tenancy from year to year. *Ridgley* v. *Stillwell*, 400.
12. A covenant for perpetual renewal of a lease is valid. *Blackmore* v. *Boardman*. 420.
13. A covenant for renewal of a lease is an incident to the lease and will pass by an assignment of the unexpired term; a sale by the sheriff under an execution of the interest of the lessee in the land will pass to the purchaser the covenant for renewal. *Id.*
14. In an action of ejectment for the recovery of leasehold premises, the plaintiff can not recover by way of damages the rents and profits beyond the time of the expiration of his title. *Gutzweiler* v. *Lachman*, 434.

LANDS AND LAND TITLES.

See CONVEYANCE. EJECTMENT.

1. Whatever may be the nature of the title acquired by the state of Missouri by virtue of the act of Congress of June 10, 1852, granting lands in aid of the construction of certain railroads—whether the state acquired the fee simple title to the lands clothed with a political trust for the execution of which the faith of the state was pledged by the acceptance of the grant, or whether the act of Congress created an estate upon

LANDS AND LAND TITLES—(*Continued.*)

condition subsequent—a mere trespasser can not defend against a grantee of the state by invoking a supposed right of the United States to enter for condition broken. *Kennett* v. *Plummer*, 142.

2. Under the act of incorporation of March 1, 1851, (Sess. Acts, 1851, p. 139,) the city of Carondelet had power to sell and dispose of its school lands; the purchaser was under no obligation to see to the application of the purchase money. She might convey a portion of her school lands in exchange for and by way of compromise of an adverse claim to land embraced within her survey of common. Third persons could not dispute the validity of such an exchange on the ground that Carondelet had thereby committed a breach of its obligation to appropriate the school lands and their proceeds to the use of schools. *Bowlin* v. *Furman*, 427.
3. A conveyance by Carondelet by quit-claim deed of a portion of its school lands is valid and operative although at the date thereof there was no survey or assignment by the United States for the use of schools; to sustain a conveyance made before such assignment it is not necessary to invoke the doctrine of the enurement of after-acquired titles. *Id.*
4. Hunt, United States recorder of land titles, upon proof of inhabitation, cultivation and possession made before him under the act of Congress of May 26, 1824, issued a certificate of confirmation to one *Louis* Lacroix. *Held*, that the title thus evidenced would not be made to enure to one *Joseph* Lacroix or his legal representatives by showing that it was said *Joseph* and not *Louis* that appeared before the recorder and made proof under the act of May 26, 1824, and that the certificate was issued by mistake to Louis instead of Joseph Lacroix. *Williams* v. *Carpenter*, 453.
5. Hunt's minutes of testimony taken by the act of Congress of May 26, 1824, are not admissible in evidence except to prove such facts as may be proved by hearsay. If professedly admitted to prove such facts, care should be taken that they are not used for other and illegal purposes. *Williams* v. *Carpenter*, 453.
6. Where a common field lot confirmed by the second section of the act of Congress of April 29, 1816, has a definite and certain location, the statute of limitations will run in favor of an adverse possession prior to an approved survey by the United States. (Aubuchon v. Ames, 27 Mo. 87, affirmed.) *St. Louis University* v. *McCune*, 481.
7. On the third of October, 1807, one A. gave to the United States recorder of land titles a notice in writing to the effect that he claimed, as assignee of B., six hundred and thirty-nine acres of land situate at Mine à Breton, by virtue of "inhabitation and cultivation" thereof by said B. This claim was presented to the board of commissioners in 1807, but was not then acted upon. In 1811, the claim was again presented to the board and was rejected on the ground that B. claimed another tract of land by concession. In 1820 notice of the claim was filed in the land office at Jackson, Mo., and the land was marked out

as reserved from sale on the plat on file in said office by red dotted lines. In 1825, Recorder Hunt, upon proof made before him by C. and D., who were the legal representatives of A. and B. as respected the whole tract claimed at Mine à Breton, issued certificates of confirmation to said C. and D. for two lots—one a village lot in Mine à Breton, and the other an outlot of said village containing about fourteen arpens. Both these lots were embraced in the tract of six hundred and thirty-nine acres as claimed before the recorder by A. On the 3d of December, 1833, C., who had acquired the interest of D., submitted said claim for the said tract to the board of commissioners organized under the act of Congress of July 9, 1832, and adduced testimony in its support. The board took no action thereon. On the 7th of August, 1834, C., in consideration of the privilege of preëmption granted by the third section of the act of Congress of July 9, 1832, taken in connection with the supplementary act of March 2, 1833, waived and relinquished to the United States, by deed duly executed, all claim whatever to said tract of six hundred and thirty-nine acres. The description in this deed of waiver and relinquishment embraced the whole tract including the village lot and outlot covered by Hunt's certificates. At the date of this deed of relinquishment and waiver, C. resided upon the village lot and cultivated the outlot for which Hunt's certificate had been issued in 1825, but no portion of his improvements extended beyond the boundaries of these lots, except a part of a field, which did extend beyond the lines of said outlot as afterwards surveyed by United States. After his said relinquishment and waiver and about the 1st of September, 1834, C. made application to the register of the land office at Jackson, Mo., to enter said tract as a preëmptor under the third section of the act of Congress of July 9, 1832. He was not then permitted to make the entry because the public surveys were not then completed. Afterwards, on the 26th of November, 1839, C. was permitted to and did enter, as preëmptor under said act of Congress of July 9, 1832, in conformity with the township and section lines, and their interferences with said tract so relinquished to the United States, various portions thereof, among others a fractional half quarter section in fractional section fifteen, township thirty-seven north, range two east. In 1843, this entry was cancelled by order of the commissioner of the general land office, concurred in by the secretary of the treasury, on the ground that the third section of the act of July 9, 1832, gave the right of preemption to none but actual settlers and housekeepers on the land sought to be entered; that C. did not bring himself within the provisions of said section, his residence on the village lot and his actual possession and cultivation of the outlot not constituting him an actual settler and housekeeper as to the whole tract claimed. Afterwards, in 1847, one E. entered said land as a preëmptor, and in 1854 obtained a patent therefor from the United States. *Held*, in a suit for possession by E. against C., that the claim of C., as the legal representative of B., to the tract of six hundred and thirty-nine acres was a claim within the meaning of the act of Congress of March 2, 1833; that C. was en-

LANDS AND LAND TITLES—(*Continued.*)

titled, under the third section of the act of Congress of July 9, 1832, to relinquish or waive said claim in favor of the United States; that, having made such a waiver or relinquishment, C. had a right, under said third section, to enter said tract as a preëmptor irrespective of the question whether he was an actual settler and housekeeper thereon or not; that the act of the executive officers of the United States in cancelling and annulling C.'s entry was void; that his entry, notwithstanding such cancellation, was valid and binding upon the United States and all persons claiming under the United States by title subsequent, whether by patent or otherwise. *O'Brien* v. *Perry*, 500.

8. The survey of the outboundary line of the town of St. Louis—the plat of which is commonly known as "Map X"—is not conclusive upon persons claiming title under confirmations by virtue of the first section of the act of Congress of June 13, 1812; said act is operative to confirm to individuals common field lots and out-lots as well without as within said outboundary line as established by said survey. *Milburn* v. *Hardy*, 514; *Milburn* v. *Hortiz*, 523.

9. The certificates of confirmation issued by Recorder Hunt under the act of Congress of May 26, 1824, are *prima facie* evidence of title by virtue of the act of Congress of June 13, 1812, as against persons claiming by title emanating from the United States in the year 1820. *Milburn* v. *Hardy*, 514.

10. So also surveys by the United States of the lots embraced in the certificates issued by Recorder Hunt under said act of May 26, 1824, are admissible in evidence as against persons claiming by titles acquired from the United States prior to the passage of said act of May 26, 1824. *Id.*

11. The corners established by the United States surveyors in surveying the public lands are conclusive as to the actual location of the boundary lines of sections and such subdivisions thereof as are authorized by the laws of the United States; it can not be shown that the United States surveyors mistakenly located such corners. *Climer* v. *Wallace*, 556.

LAW COMMISSIONER'S COURT.

See JURISDICTION.

LEASE.

See LANDLORD AND TENANT. COVENANT.

LEVY.

See ATTACHMENT. EXECUTION. SHERIFF. CLAIM AND DELIVERY OF PERSONAL PROPERTY.

LIEN.

See MECHANICS' LIEN. BOATS.

LIMITATION.

1. Where a common field lot confirmed by the second section of the act of

LIMITATION—(*Continued.*)

Congress of April 29, 1816, has a definite and certain location, the statute of limitations will run in favor of an adverse possession prior to an approved survey by the United States. (Aubuchon v. Ames, 27 Mo. p. 87, affirmed.) *St. Louis University* v. *McCune*, 481.

2. Where a proprietor of land, through mistake or ignorance of the true location of the line separating his tract from that of an adjoining proprietor and with no intention to claim beyond the true line of separation, extends his fence beyond such line and encloses a portion of the land of such adjoining proprietor, the possession thus acquired will not be adverse. *Id.*

LIST OF TAXABLE PROPERTY.

1. In an indictment founded on the fifteenth section of the second article of the revenue act of 1857, (Sess. Acts, 1857, Adj. Sess. p. 79,) for delivering to the assessor a false and fraudulent list of taxable property, it must appear in what respect the list delivered is false and fraudulent; the indictment must set out, in terms of general description at least, the taxable property owned by the defendant and fraudulently omitted in the list delivered. *State* v. *Welch*, 600.

LOST GOODS.

See CRIMES AND PUNISHMENTS.

M

MANDAMUS.

1. Where an inferior judicial tribunal declines to hear a cause upon what is termed a preliminary objection—as where, in a statutory proceeding instituted to contest the election of a sheriff, the court refuses to try the cause upon the merits but dismisses the same and quashes the proceedings on the ground that the contestant had not given the notice required by the statute—a mandamus will lie from the supreme court commanding the inferior court to reinstate the cause upon its docket and proceed to try the same, if such court had misconstrued the law in such preliminary matter. (SCOTT, Judge, dissenting.) *Castello* v. *St. Louis Circuit Court*, 259.

MARRIED WOMEN.

See CONVEYANCE. DIVORCE. DOWER.

MASTER.

See BOATS AND VESSELS.

MAYOR.

See BOONVILLE.

MECHANICS' LIEN.

1. The Kansas city court of common pleas has no jurisdiction of actions to enforce mechanics' liens. *Ashburn* v. *Ayres*, 75; *Platt* v. *Smith*, 593.
2. Where a material man institutes proceedings to enforce a lien against the contractor and the owner of the building, and dismisses the same

MECHANICS' LIEN—(*Continued.*)

as to the original debtor, the contractor, the proceeding must also be dismissed as to the owner of the building, there being no party on the record to defend the suit. *Id.*

3. Public bridges are not subjected by the St. Louis mechanics' lien act of February 14, 1857, (Sess. Acts, 1857, p. 668,) to liens for work done thereon or for materials furnished for their construction. *McPheeters* v. *Merimac Bridge Co.*, 465.
4. The bridge authorized to be built by the act of February 24, 1853, incorporating the Merimac Bridge Company, (Sess. Acts, 1853, p. 195,) was a public bridge. *Id.*

MERCHANTS' LICENSES.

1. A druggist who, in good faith, sells intoxicating liquor, whisky, for medical purposes, can not be rendered liable to an indictment for selling liquor in a less quantity than a gallon; he is not required to institute a strict inquisition into the motives and objects of the persons dealing with him. *State* v. *Mitchell*, 562.
2. A dealer in drugs and medicines is a merchant within the meaning of the first section of the act to tax and license merchants. (R. C. 1855, p. 1072.) *State* v. *Wells*, 565.
3. To constitute a merchant a dealer in drugs and medicines within the meaning of the twenty-second section of the act to tax and license merchants (R. C. 1855, p. 1077) so as to authorize him, under his license as a merchant, to sell spirituous liquors in any quantity when it is used only for medical purposes, it is necessary that he should be engaged principally in selling drugs and medicines, though he may incidentally admit into his store and may vend articles not strictly falling under the denomination of drugs and medicines. *State* v. *Wells*, 565.
4. The act regulating dram-shops, approved December 13, 1855, (R. C. 1855, p. 683) and the act to tax and license merchants, approved December 11, 1855 (R. C. 1855, p. 1077, § 22,) did not affect the validity of an unexpired grocer's license granted previous to May 1, 1856. *State* v. *Andrews*, 14.
5. The revised code of 1855 repealed the third section of the act of March 25, 1845, (R. C. 1845, p. 542); consequently a grocer, under an unexpired license granted previous to May 1, 1856, might permit intoxicating liquor sold by him after May 1, 1856, to be drank at a place under his control. *Id.*

MERIMAC BRIDGE.

See MECHANICS' LIEN.

MILLS AND MILL-DAMS.

1. The court ought not, in proceedings instituted under the act concerning mills and mill-dams, to give permission to erect, or increase the altitude of, a dam, if it appear that the mansion-house of any proprietor or other out-houses, curtilages or gardens thereto belonging, or orchard, will be overflowed, or that the health of the neighborhood will be materially affected. *Willoughby* v. *Shipman*, 50.

MILLS AND MILL-DAMS—(*Continued.*)

2. A spring-house is an out-house within the meaning of the eighteenth section of said act. *Id.*

MINORS.

See REVENUE.

MORTGAGE.

See ATTACHMENT, 6.

1. Until entry by a mortgagee for condition broken, or until foreclosure, the mortgagor is the owner of the mortgaged estate and may lease the same, or otherwise deal with it as owner. *Kennett* v. *Plummer*, 142.

MULTIFARIOUSNESS.

See PLEADING.

N

NEGLIGENCE.

See CARE. RAILROADS.

NOTICE.

See DEPOSITIONS. CONVEYANCE.

P

PARTIES.

See PLEADING.

PARTITION.

1. Should a testator, by reason of a failure to name or provide for some of his children in his will, be deemed in law to have died intestate as to those not named, they can not maintain against the devisees an action for the partition of the property embraced in the devise; resort must be had to a petition for contribution, in which the equities arising out of advancements may be adjusted. *Hill* v. *Martin*, 78.
2. Each court may control the execution of its own process. Should a court, in a suit for partition, order a sale of land situate in a county other than that in which the suit is pending, it may entertain a motion to set such sale aside on the ground of fraud on the part of the purchaser. *Kyte* v. *Plemmons*, 104.
3. Should, however, an original action be instituted to set aside such sale, it must be brought in the county in which the land is situated. *Id.*
4. Suits for partition may be maintained in behalf of those having equitable titles only. *Welch* v. *Anderson*, 293.
5. Infants may be plaintiffs in statutory proceedings for partition. *Waugh* v. *Blumenthal*, 462.
6. The act of February 21, 1845, (R. C. 1845, p. 764,) providing for the partition of land, &c., authorized the joinder of all the parties in inter-

PARTITION—(*Continued.*)

est as parties plaintiff in a statutory proceeding for partition. (Bompart v. Roderman, 24 Mo. 385, overruled.) *Id.*

7. Where in a partition suit a sale of the premises is ordered, and previous to the sale it is agreed between certain parties in interest that one of their number shall bid off the property at such sale unless it brings a certain price, and hold it for the benefit of the parties to the agreement and such others of those interested as may choose to become parties thereto, and that the others shall abstain from bidding at such sale, and he does purchase the property under such agreement; *held*, that he will hold it in trust for all the parties in interest. *Northcraft* v. *Martin*, 469.
8. Where in an action for partition a sale is made by the sheriff under the order of the court, the court may, at any time during the term to which the process issued to the sheriff is returnable, set aside such sale without notice to the purchasers thereat; the court has power to control the execution of its own process, and it is not essential to the exercise of this power that the purchasers should be notified. *Neiman* v. *Early*, 475.

PARTNERSHIP.

1. Where property is bailed to a partnership, one partner can not absolve himself from liability to a bailor, without the latter's consent, by retiring from the firm. Where, however, property is not bailed for any definite time, but the bailor may take the same away at any time, a retiring partner may give notice to the bailor of his retiring and may require him to take away the bailed property; if the bailor should then permit it to remain after the expiration of a reasonable time, he must look to the remaining partners; the retiring partner would be absolved from liability for loss occurring after his retirement. *Winston* v. *Taylor*, 82.
2. A person can not give himself credit as the partner of another by holding himself out to the world as such without the consent, express or implied, of such other person. *Crook* v. *Davis*, 94.
3. Upon the dissolution of a partnership by the death of a partner, the surviving partner may proceed to wind up and settle the affairs of the partnership without giving bond as required by the fifth section of the first article of the act respecting executors and administrators; he may transfer a promissory note held by the partnership in payment of a partnership debt or liability. *Bredow* v. *Mutual Savings Institution*, 181.
4. Should the surviving partner fail, within the time limited, to give bond as required by the fifty-fifth section of the first article of the administration act, he is liable to be ousted from possession of the partnership effects, and divested of the right to administer on the same, by the executor or administrator of the deceased partner, if the latter should give bond as required by the fifty-ninth section of the first article of said act. *Id.*
5. Where a lease is made to five persons, and there is nothing on the face of the lease to indicate that the lease was made to them for partnership purposes, and under a judgment against one of them his interest

PARTNERSHIP—*(Continued.)*

in the lease is levied on and sold, and the purchaser institutes an action for partition of the leasehold premises; *held*, that, at law, the lessees held the premises as tenants in common and the purchaser at the execution sale acquired the apparent interest of the execution debtor; that the defendants could not show, by way of equitable defence to the partition suit, that the said leasehold premises were purchased and held for partnership purposes and were consequently personalty, and that the execution debtor had no interest therein, unless they set up such a defence in their answer; that if such defence were set up, notice must be brought home to the purchaser. *Cowden* v. *Cairns*, 471.

PATENT RIGHT.

See EVIDENCE, 31.

1. To render an assignment of a patent right or of an undivided part thereof valid, it is not necessary that it should be recorded in the United States patent office; the assignee will have a vendible interest without such record. *Sone* v. *Palmer*, 539.

PENALTY.

See DAMAGES.

PHELPS COUNTY.

See SEATS OF JUSTICE.

PLEADING.

See SLANDER. EQUITY, 2. PARTITION, 5, 6. PRACTICE, 34, 35. PARTNERSHIP, 5.

1. In every answer, amendatory or supplemental, the defendant must set forth, in one entire pleading, all matters which by the rules of pleading may be set forth therein, and which may be necessary to the proper determination of the defence. (R. C. 1855, p. —, § 13.) The courts can not permit parties to dispense by agreement with the statutory provision bearing on this subject; as by agreeing that the original and amended answers shall be considered as one. *Basye* v. *Ambrose*, 39.
2. A defendant can not be permitted to introduce evidence to support a defence to the action not set up in his answer. *Winston* v. *Taylor*, 82; *Cowden* v. *Cairns*, 471.
3. It is not necessary in pleading to allege that a guaranty relied on is in writing. *Miles* v. *Jones*, 87.
4. A. and B. combining, by threats of violence against C., extorted from the latter the transfer to themselves of a certain tract of land owned by the latter—one portion thereof being conveyed to A., and the other to B.—A. conveyed his portion to D., who took with notice. C. instituted an action against A., B. and D. to obtain an annulment of said deeds. *Held*, that the petition was not multifarious. *Bray* v. *Thatcher*, 129.
5. In a suit to recover damages for the breach of a written contract entered into with two persons, both must join as parties plaintiff. The fifth section of the second article of the practice act is inapplicable to such a case. (R. C. 1855, p. 1218.) *Ranney* v. *Smizer*, 310.

PLEADING—(*Continued.*)

6. The objection that a petition does not state facts constituting a cause of action is not waived by a failure to take the same by demurrer; the defendant may make the same by motion for new trial, or may at the trial oppose on this ground the introduction of evidence on the part of the plaintiff. *Syme* v. *Steamboat Indiana*, 335.
7. A defendant will not be permitted at the trial of a cause to amend by denying facts admitted in his answer. *Harrison's Adm'r* v. *Hastings*, 346.
8. A defendant should not be permitted to introduce evidence to support a defence not set up in his answer. *Lynch* v. *Morrow's Adm'r*, 357.
9. A petition is not demurrable because a judgment is asked not warranted by the averments; the court may grant any relief consistent with the case made and the allegations of the petition. *Northcraft* v. *Martin*, 469.
10. A defendant can not introduce evidence to support a defence not set up in his answer. If the evidence discloses a defence not set up in the answer, the court may, in furtherance of justice and on such terms as may be fit, allow the defendant to amend his pleading so as to make it conform to the facts in proof, provided the amendment does not substantially change the defence. *Irwin* v. *Chiles*, 576.
11. Should a testator, by reason of a failure to name or provide for some of his children in his will, be deemod in law to have died intestate as to those not named, they can not maintain against the devisees an action for the partition of the property embraced in the devise; resort must be had to a petition for contribution, in which the equities arising out of advancements may be adjusted. *Hill* v. *Martin*, 78.
12. A person to whom a negotiable promissory note has been endorsed may maintain an action thereon in his own name, although it was endorsed to him merely for collection. In a suit on such a note by an endorsee the caption of the petition was as follows: "A., to the use of B., plaintiff, v. C., defendant." In the body of the petition the plaintiff alleged title in himself by endorsement from B. *Held*, that the words in the caption "to the use of B." might be regarded as mere surplusage. *Beattie* v. *Lett*, 596.

POLICY.

See INSURANCE.

PRACTICE.

See ROADS AND HIGHWAYS, 1. SECURITY FOR COSTS. DAMAGES, 3, 4, 5. TRESPASS. EXECUTION. WILLS AND TESTAMENTS. ELECTION. JUSTICES' COURTS.

1. Where no cause of action is stated in a petition, the defect will not be cured by verdict; the objection may be taken by motion in arrest of judgment. *Welch* v. *Bryan*, 30.
2. A verified statement upon which a confession of judgment is rendered must state concisely the facts out of which the indebtedness arose. If it state the execution of a promissory note to the plaintiff; that "said note was given for goods, wares and merchandise sold by the plaintiff

PRACTICE—(*Continued.*)

to the defendant before the date thereof," it will be materially defective. *Bryan* v. *Miller*, 32.

3. A judgment rendered upon such a statement, though not valid as to other judgment creditors, would be valid between the parties thereto. The defective statement might be amended, but not so as to affect rights of existing judgment creditors. *Id.*
4. When the defendant in an execution is not a resident of the county in which the land sought to be sold is situated, the plaintiff in the execution should give notice to the defendant of the issuing of the same as required by section 46 of the act regulating executions. (R. C. 1855, p. 766, § 46.) Should no such notice be given, and property be levied on and sold under the execution, the defendant may on the return day of the execution move the court to set aside such sale, and the court should set aside the same although the sheriff may have executed the deed to the purchaser before the return day of the execution. *Ray* v. *Stobbs*, 35.
5. Parties aggrieved by the location of a state road have a right of appeal to the circuit court. Since, however, there is no provision authorizing the signing of bills of exceptions in such cases, the circuit court must affirm or reverse on the record alone. *Bernard* v. *Callaway County Court*, 37.
6. In every answer, amendatory or supplemental, the defendant must set forth, in one entire pleading, all matters which by the rules of pleading may be set forth therein, and which may be necessary to the proper determination of the defence. (R. C. 1855, p. ——, § 13.) The courts can not permit parties to dispose by agreement with the statutory provision bearing on this subject; as by agreeing that the original and amended answers shall be considered as one. *Basye* v. *Ambrose*, 39.
7. Where the plaintiff in a suit gives security for costs and the defendant prevails in the action, judgment may be rendered at the same time against the surety; should however judgment for costs against the surety be omitted, the defendant may sue the surety directly on his undertaking. *Davis* v. *Farmer*, 54.
8. A defendant can not be permitted to introduce evidence to support a defence to the action not set up in his answer. *Winston* v. *Taylor*, 82; *Cowden* v. *Cairns*, 471.
9. A judgment obtained in a sister state upon notice to the defendant by publication only, there being no appearance of the defendant, will be deemed null and void outside the state in which it is rendered. *Winston* v. *Taylor*, 82.
10. Each court may control the execution of its own process. Should a court, in a suit for partition, order a sale of land situate in a county other than that in which the suit is pending, it may entertain a motion to set such sale aside on the ground of fraud on the part of the purchaser. *Keyte* v. *Plemmons*, 104.
11. Should, however, an original action be instituted to set aside such sale, it must be brought in the county in which the land is situated. *Id.*
12. Where a cause is properly triable by the court, the parties are not en-

PRACTICE—(*Continued.*)

titled as a matter of course to have issues framed and submitted to a jury. The cases in which it is peculiarly appropriate to direct issues to be submitted to and tried by a jury are those in which single material facts are disputed and the evidence is conflicting. *Morris* v. *Morris*, 114.

13. Issues submitted to a jury should be framed in language plain and perspicuous. *Id.*
14. Instructions given to a jury should contain no comments on the evidence. *Id.*
15. Granting that an appeal would lie from the judgment of a county court in a proceeding instituted to obtain a removal of the seat of justice, it would only lie in the case of a final judgment. *Wood* v. *Phelps County Court*, 119.
16. Neither under the general act regulating the removal of seats of justice (R. C. 1855, p. 513), nor under the act organizing Phelps county (Sess. Acts, 1857, Adj. Sess. p. 397) would an appeal lie to the circuit court from an order of the county court sustaining or overruling a motion to set aside or vacate a former order of the county court approving the location of the seat of justice. *Id.*
17. Where a plaintiff seeks relief other than the recovery of money only or of specific real or personal property — as where the annulment of deeds is sought on the ground that they were obtained by duress and violence —the cause must be tried by the court and not by the jury. *Bray* v. *Thatcher*, 129.
18. Where a suit results adversely to the plaintiff and he becomes liable for costs and judgment is rendered accordingly, it is no error as against him that judgment for costs is also rendered against another irregularly made a party to the suit at the instance of the defendant. *Dickerson* v. *Chrisman*, 134.
19. Where a deposition is offered in evidence, and its admission is objected to for various reasons, if the objection that the absence of the witness has not been accounted for be not made, it will be deemed to have been waived. *Id.*
20. The rule that a judgment is an entire thing, and if reversed as to one must be reversed as to all, is only applicable to judgments at law. *Id.*
21. The supreme court will not grant new trials on the ground that verdicts are against the weight of evidence; it is the province of the jury to attach such credit to the testimony of witnesses as they may think it entitled to. *Steamboat City of Memphis* v. *Matthews*, 248.
22. When the record proper of a cause shows that a demurrer to a petition has been regularly heard, considered and overruled, the objection will not be entertained in the supreme court that the court overruled the demurrer without hearing counsel. *The State, to use, &c.*, v. *Sanger*, 314.
23. After a defendant in an action before a justice of the peace appears and consents to a continuance, it is too late to object to the jurisdiction of the justice on the ground that the defendant does not reside in the township in which the suit is brought. *Bohn* v. *Devlin*, 319.

PRACTICE—*(Continued.)*

24. A notice to take depositions that is unsigned is insufficient; depositions taken upon such a notice, the opposite party not attending, either in person or by attorney, at the time and place specified in the notice, may be suppressed. *Id.*
25. The issues of fact in an action brought to obtain the surrender and cancellation of a promissory note must be tried by the court, unless the court takes the opinion of a jury upon some specific question of fact involved therein, by an issue made up for that purpose. (R. C. 1855, p. 1261, § 13.) *Conran* v. *Sellew*, 320.
26. Where the trial must be by the court, instructions or declarations of law in the form of instructions are not required, and if given will not be reviewed or noticed by the supreme court. *Id.*
27. When either party to a cause offers to read a deposition taken therein, he must read the whole of it, except such portions, if any, as are ruled out by the court as inadmissible. *Hill* v. *Sturgeon & Rawlings*, 323.
28. The objection that a petition does not state facts constituting a cause of action is not waived by a failure to take the same by demurrer; the defendant may make the same by motion for new trial, or may at the trial oppose on this ground the introduction of evidence on the part of the plaintiff. *Syme* v. *Steamboat Indiana*, 335.
29. Where an application is made for a continuance on the ground of the absence of a material witness, it must appear from the accompanying affidavit that the applicant had used due diligence to procure the testimony of such absentee. *Cline & Jamison* v. *Brainard*, 341.
30. A defendant will not be permitted at the trial of a cause to amend by denying facts admitted in his answer. *Harrison's Adm'r* v. *Hastings*, 346.
31. Should the objection be taken, at the trial of an issue raised by an interplea in an attachment, that the interpleader only claims the attached property as *cestui que trust*, he should be permitted to substitute his trustee as plaintiff in the interplea. *Winkelmaier* v. *Weaver*, 358.
32. A party can not assign for error that which is beneficial to himself and prejudicial to the opposite party alone. *Hohenthal* v. *Watson*, 360.
33. Where, in an action for the possession of personal property, the plaintiff gives bond and receives possession of the property, and the cause is tried by a jury, the jury, regularly, in case of finding for the defendant, should assess the *value* of the property, as also the damages. *Id.*
34. It is the province of the jury to determine questions of fact at issue in a cause; the court should not direct them to draw inferences that are not legal inferences. *Moies* v. *Eddy*, 382.
35. A. filed a bill in chancery against B. for a general account of a partnership. B., in his answer, set up as a defence that an account of the affairs of the partnership had been stated and settled. Upon a hearing, there was an interlocutory decree finding a settlement as stated in the answer. An amended bill being filed and leave given to either party to surcharge and falsify the account stated, said account was referred to a commissioner "with instructions to examine the same as to errors and omissions on the footing of said account stated, and to state a bal-

PRACTICE—(*Continued.*)

ance of account and interest due to either party, from the pleadings and evidence now in this cause, and such further competent evidence as either party may produce before him in conformity to this decree." *Held*, that, under this order of reference, the examination before the commissioner was confined to such errors and omissions as were specifically charged in the pleadings and sought therein to be surcharged and falsified. *Boyle* v. *Hardy*, 390.

36. Though all the evidence already in the cause was before the commissioner by virtue of the order of reference, yet balance sheets made out to supply the loss of others that had been in evidence before a former commissioner would not be admissible unless supported by proper testimony. *Id.*

37. Although a witness, a surveyor, should be improperly permitted to give his opinion upon a matter of law, as to declare what are the controlling calls of a deed, a judgment will not be reversed for this impropriety, if the opinion given be substantially correct and such as can not have prejudiced the party complaining of it. *Whittelsey* v. *Kellogg*, 404.

38. If the plaintiff in an action of ejectment fail at the trial to establish his right to a recovery upon the title relied on by him, he may resort to another title; it is improper to require him to elect one of two titles, upon which he announces his purpose to rely, as that upon which he must base his right to a recovery, even though such titles be inconsistent with each other. *St. Louis Public Schools* v. *Risley*, 415.

39. Where in an action for partition a sale is made by the sheriff under the order of the court, the court may, at any time during the term to which the process issued to the sheriff is returnable, set aside such sale without notice to the purchasers thereat; the court has power to control the execution of its own process, and it is not essential to the exercise of this power that the purchasers should be notified. *Neiman* v. *Early*, 475.

40. Since the enactment of the practice act of 1849, the supreme court will reverse for error committed during the progress of a trial and duly excepted to, although the same may not have been brought to the attention of the court by a motion for a new trial. *Prince* v. *Cole*, 486.

41. The courts should not, in instructions to a jury, take for granted facts in issue in the cause. *Chouquette* v. *Barada*, 491.

42. Where a deed, purporting to be the deed of a corporation, is admitted, and no objection is made to its introduction on the ground that the corporate seal has not been proved, this objection will not be entertained in the supreme court. *Id.*

43. Courts should not in instructions comment on the evidence; it is the province of the jury to draw inferences from the facts in evidence; the courts should not give undue importance to particular facts in evidence by telling the juries that they are authorized to draw certain specified inferences from them. *Id.*

44. If a plaintiff voluntarily suffers a nonsuit before the court has made any ruling prejudicial to him, the supreme court will not interfere. *Sone* v. *Palmer*, 539.

PRACTICE—(*Continued.*)

45. A special adjourned session of a court, although it may with propriety be said to be a continuance of the regular term, since its object is the completion of the business of the regular term, is a separate and distinct term of the court. Should such a special adjourned term be appointed and a cause be continued thereat at the cost of the party applying for such continuance, this order, properly construed, would embrace the costs of such adjourned term only and not those of the previous regular term. *Dulle* v. *Deimler*, 583.
46. Should the clerk in such case, in issuing execution for costs, include the costs of the regular term, the court may at a subsequent term order a retaxation of the costs. *Id.*
47. A defendant can not introduce evidence to support a defence not set up in his answer. If the evidence discloses a defence not set up in the answer, the court may, in furtherance of justice and on such terms as may be fit, allow the defendant to amend his pleading so as to make it conform to the facts in proof, provided the amendment does not substantially change the defence. *Irwin* v. *Chiles*, 576.
48. In a suit upon a promissory note, if the defendant be personally served with process, he must answer the petition on or before the second day of the term at which he is bound to appear. (R. C. 1855, p. 1235, § 24.) This rule applies where an attachment is sued out in aid of such suit, in case there has been service of the writ of attachment in time for judgment at such term. *Farrington* v. *McDonald*, 581.
49. At the May term, 1857, of the Caldwell county court an account was presented for allowance against the county. The account was disallowed. At the March term, 1858, by leave of court, testimony touching the same account was introduced. The court having heard the testimony, "adhered to its former decision." An appeal was then taken to the circuit court. *Held*, that the appeal was well taken; that the rejection of the claim at the May term, 1857, was not like a judgment in a suit between individuals which the court could not open at a subsequent term; that the county court could waive an advantage the county might have. *Boggs* v. *Caldwell County*, 586.
50. In a statutory proceeding to contest the validity of a will, the burden of proof rests upon the defendants; consequently they have the right to open and close the case to the jury. *Cravens* v. *Falconer*, 19.
51. Should a testator, by reason of a failure to name or provide for some of his children in his will, be deemed in law to have died intestate as to those not named, they can not maintain against the devisees an action for the partition of the property embraced in the devise; resort must be had to a petition for contribution, in which the equities arising out of advancements may be adjusted. *Hill* v. *Martin*, 78.
52. The supreme court will not review the verdicts of juries on the ground that they are against the weight of evidence. *Backster* v. *Hall*, 593.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

See EVIDENCE, 1. CRIMES AND PUNISHMENTS.

1. A justice of a county court is not authorized to let to bail a person in-

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES—(*Continued.*)

dicted for a bailable offence unless the indictment is pending in his county. *State* v. *Nelson*, 13.

2. A. was indicted for stealing certain cattle alleged in the indictment to be the property of B. At the trial, one C., who had been summoned as a juror, stated, upon his *voir dire*, that he knew the cattle alleged to have been stolen; that his brother had once owned them, and had sold them to one K., who had sold them to B. *Held*—the allegation as to B.'s ownership not being controverted on the trial—that C. was a competent juror. *State* v. *Martin*, 530.
3. The St. Louis criminal court has power, of its own motion, to order a removal of a cause to the St. Louis circuit court on the ground that the judge of the said criminal court has been of counsel for the defendant; the local act of December 11, 1855, (R. C. 1855, p. 1591,) is confined to changes of venue made upon the application of the defendant. *State* v. *Houser*, 232.
4. A general verdict against a defendant in a criminal case will authorize a judgment thereon if there is a single good count in the indictment. *State* v. *Montgomery*, 594.
5. It is competent in a criminal case, as affecting the credibility of a witness, to inquire into the state of his feelings towards the party against whom he is called upon to testify; this inquiry can not, however, be made concerning the witness' feeling towards the husband of such party. *Id.*

PRE-EMPTION.

See LANDS AND LAND TITLES, 7.

PRESUMPTIONS.

See EVIDENCE. WILLS AND TESTAMENTS.

PRINCIPAL AND AGENT.

See BOATS AND VESSELS.

1. A. was appointed attorney for a bank for a term of two years. His compensation as such attorney was three per cent. upon all collections made by him in the county in which the bank was located, and five per cent. upon all collections made out of said county. During his term of office, he obtained judgment in favor of the bank upon a claim deposited in his hand for collection. *Held*, that he was entitled to his three per cent. commission on the amount recovered, whether he received the money on the judgment during his term of office or not. *State, to use, &c.*, v. *Hawkins*, 366.
2. An attorney of record in a cause is authorized to receive payment of a judgment recovered therein. Those dealing with such an attorney will not be affected by any arrangements entered into by him with his client, or by a revocation of his authority of which they have no notice. *Id.*
3. The master of a steamboat has no authority, as master, to bind the boat or its owners by a promissory note. *Gregg* v. *Robbins*, 347.
4. The inspector of the fire department of the city of St. Louis had power,

PRINCIPAL AND AGENT—*(Continued.)*

under the thirteenth section of the ordinance establishing and regulating the fire department, approved April 5, 1856, (Rev. Ord. 434,) to order and contract for repairs of engine houses, where the repairs ordered amounted to more than fifty dollars; a contract for repairs made by him as inspector, though not made in the name of the city of St. Louis, would be binding upon her. *Robinson* v. *City of St. Louis*, 488.

5. Where a party relies upon an instrument purporting to have been executed by an agent, he must prove the agent's authority. *Sone* v. *Palmer*, 539.
6. Where a mature negotiable promissory note is delivered by the payee without endorsement to an agent for collection, the possession of the note by the latter will not raise a presumption that he has authority to assign the same; the burden of proving an assignment by authority of the payee rests upon the party claiming under such alleged assignment. *Hardesty* v. *Newby*, 567.
7. An agent has discharged his duty when he pays over to his principal money collected by him as agent; it is no concern of his whether his principal's title thereto is good or bad. *Witman* v. *Felton*, 601.
8. Where, in an action by a principal against an agent to recover money alleged to have been collected by him as agent, there is evidence showing that the defendant did collect the money as agent for the plaintiff, this evidence can not be refuted by showing that the title of the plaintiff to such money is bad as against third persons. *Id.*

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

R

RAILROADS.

1. Whatever may be the nature of the title acquired by the state of Missouri by virtue of the act of Congress of June 10, 1852, granting lands in aid of the construction of certain railroads—whether the state acquired the fee simple title to the lands clothed with a political trust for the execution of which the faith of the state was pledged by the acceptance of the grant, or whether the act of Congress created an estate upon condition subsequent—a mere trespasser can not defend against a grantee of the state by invoking a supposed right of the United States to enter for condition broken. *Kennett* v. *Plummer*, 142.
2. The charter of the St. Louis and Iron Mountain Railroad Company did not confer upon a justice of the peace jurisdiction of an action against the company to recover damages for injuries sustained by reason of the construction of a culvert. *Fatchel* v. *St. Louis & Iron Mountain Railroad Co.*, 178.
8. Justices of the peace have jurisdiction of actions brought against railroad corporations under the twelfth section of the general railroad act. (R. C. 1855, p. 414.) *Mooney* v. *Hannibal & St. Joseph Railroad Co.*, 570.

RECOGNIZANCE.

1. A justice of a county court is not authorized to let to bail a person indicted for a bailable offence unless the indictment is pending in his county. *State* v. *Nelson*, 13.

RECORD.

See ESTOPPEL.

REDEMPTION OF LAND SOLD FOR TAXES.

See REVENUE.

REFERENCE.

See PRACTICE, 34, 35.

REPLEVIN.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

RES ADJUDICATA.

See JUDGMENTS OF SISTER STATES. CONFLICT OF LAWS.

RESULTING TRUSTS.

1. Resulting trusts are not within the statute of frauds. *Cason* v. *Cason*, 47; *Morris v. Morris*, 114; *Cloud* v. *Ivie*, 578.
2. A resulting trust arises by operation of law where the purchase money of real estate is paid by one person and the legal title is transferred to another. The relation of trustee and *cestui que trust* in such cases must result from the facts as they exist at the time of or anterior to the purchase, and can not be created by subsequent occurrences. *Kelly* v. *Johnson*, 249.
3. It is not essential to the creation of a resulting trust that the money advanced should come directly from the *cestui que trust;* it is sufficient if it satisfactorily appear that the person supplying it intends it as a gift or loan to such *cestui que trust*. *Id.*
4. Where two proprietors of land agree that one of them shall enter under the graduation law of Congress an adjoining tract of government land, each furnishing one-half the sum required to pay the graduation price, and that the one who enters shall convey one-half the tract to the other, and the entry is made under this agreement; *held*, that there will be a resulting trust as to one-half of the land entered. *Cloud* v. *Ivie*, 578.

REVENUE.

See FEES.

1. The provisions of the act of February 13, 1847, (Sess. Acts, 1847, p. 122, § 31, 32, incorporated into the revised code of 1855, R. C. 1855, p. 1360, § 35, 36,) in so far as they regulate the redemption by minors of land sold for taxes, are complete in themselves and do not need the aid of the act of 1845. (R. C. 1845, p. 951, § 14.) *Stewart* v. *Brooks*, 62.
2. To entitle a minor to redeem lands sold for taxes, as provided by sections 31 and 32 of the act of February 13, 1847, and by sections 35 and 36 of the revenue act of December 13, 1855, he must pay to the pur-

REVENUE—(*Continued.*)

chaser at the tax sale double the amount of all the taxes and costs paid by him at the time of his purchase, together with fifteen per cent. per annum upon this amount from the date of the tax deed; he shall also refund to the purchaser the amount of taxes paid by him after the date of his purchase, together with interest thereon at the rate of six per cent. per annum from the times of payment respectively, whether before or after the date of the tax deed. *Id.*

ROADS AND HIGHWAYS.

1. Under the general law concerning roads and highways, (R.C. 1855, p. 1390, § 20,) only those persons who own land through which the route of a state road is located and who consider themselves aggrieved by the assessment of the commissioners can object in the county court to the approval of the report of the commissioners locating the road. *Bernard* v. *Callaway County Court*, 37.
2. Parties aggrievd by the location of a state road have a right of appeal to the circuit court. Since, however, there is no provision authorizing the signing of bills of exceptions in such cases, the circuit court must affirm or reverse on tho record alone. *Id.*

RULE IN SHELLEY'S CASE.

See WILLS AND TESTAMENTS, 4, 5.

S

ST. LOUIS.

See CITY OE ST. LOUIS.

SALES.

See VENDORS AND PURCHASERS. SHERIFF.

SATISFACTION.

See ACCORD.

SEATS OF JUSTICE.

1. Granting that an appeal would lie from the judgment ot a county court in a proceeding instituted to obtain a removal of the seat of justice, it would only lie in the case of a final judgment. *Woods* v. *Phelps County Court*, 119.
2. Neither under the general act regulating the removal of seats of justice (R. C. 1855, p. 513), nor under the act organizing Phelps county (Sess. Acts, 1857, Adj. Sess. p. 397) would an appeal lie to the circuit court from an order of the county court sustaining or overruling a motion to set aside or vacate a former order of the county court approving the location of the seat of justice. *Id.*
3. Where a public act requiring the exercise of judgment is to be performed by several commissioners appointed in a statute, all of them must meet and confer. *Id.*
4. Though a majority of the commissioners appointed by the act organizing Phelps county (Sess. Acts, 1857, Adj. Sess. p. 397) may make a

SEATS OF JUSTICE—*(Continued.)*

location of a seat of justice, yet all the commissioners appointed must meet and confer with respect to such location. *Id.*

SECURITY FOR COSTS.

1. Where the plaintiff in a suit gives security for costs and the defendant prevails in the action, judgment may be rendered at the same time against the surety; should however judgment for costs against the surety be omitted, the defendant may sue the surety directly on his undertaking. *Davis* v. *Farmer*, 54.
2. The plaintiff in a suit gave security for costs by an instrument in the following form: "I. S. v. N. A. D. Civil action. We, I. S. as principal, and W. B. F. and B. S. L. as sureties, are held and firmly bound for the payment of all the costs that have accrued or may accrue in the above case. Witness our," &c. *Held*, judgment having been rendered against the plaintiff for costs, that suit might be maintained on this instrument by the defendant against the sureties. *Id.*

SESSION.

See COSTS. COURT.

SET-OFF.

1. The third section of the act of 1855 concerning bonds, notes and accounts (R. C. 1855, p. 322), allowing the obligor or maker of a non-negotiable promissory note every just set-off against the assignor existing at the time of the assignment unless it is expressed in the note that it is "for value received, negotiable and payable without defalcation," is not applicable to notes executed before the revised code of 1855 went into effect and made payable "without defalcation or discount," although assigned after said code went into effect. *Paston* v. *Bussmeyer*, 330.

SHERIFF.

See EXECUTION. ATTACHMENT. ELECTION.

1. Where, in St. Louis county, a levy of an execution or attachment is made upon personal property, a person other than the defendant in such execution or attachment, claiming the property so levied on, has a choice of remedies. He may make claim to the property in accordance with the third section of the local act of March 3, 1855, (Sess. Acts, 1855, p. 464); in which case, if the sheriff or other officer demands and receives a *sufficient* indemnification bond from the plaintiff in the execution or attachment, the claimant will have no remedy against the officer but must resort to a suit on the indemnification bond. Should the claimant, however, not make claim in the manner provided in said section, he may maintain an action against the sheriff or other officer for the possession of the property levied on. *Bradley* v. *Holloway*, 150.
2. A sheriff or other officer levying an execution or attachment is not authorized, under said act of March 3, 1855, to demand an indemnification bond of the plaintiff in the execution or attachment unless claim

SHERIFF—(*Continued.*)

is made to the property levied on substantially as provided in the third section of said act. *Id.*

3. Where a sheriff in St. Louis county levies an execution upon personal property, a third person claiming the same may maintain an action against the sheriff for its possession without making claim thereto in accordance with the third section of the local act of March 3, 1855. (Sess. Acts, 1855, p. 464.) *St. Louis, Alton & Chicago Railroad Co.* v. *Castello*, 379.
4. A sheriff, under an execution against A., levied upon a lot of gold and silver and copper coins and paper currency belonging to B.; B., with a view to facilitate the institution of a suit by himself to test his title, substituted, in the hands of the sheriff, for the property levied on, bank bills of large denomination, the exchange being made by him and the sheriff under the understanding that suit would be brought by B. for the possession of the bank bills thus substituted. *Held*, that B. might, under such circumstances, maintain an action against the sheriff for the possession of the bank bills. *Id.*
5. Where a sheriff receives a writ of execution and does not levy the same during his term of office, it is his duty, at the expiration of his term, to deliver said writ to his successor in office, whose duty it is to receive and execute the same. *Dunnica* v. *Coy*, 525.

SHERIFF'S SALES.

See EXECUTION.

1. When the defendant in an execution is not a resident of the county in which the land sought to be sold is situated, the plaintiff in the execution should give notice to the defendant of the issuing of the same as required by section 46 of the act regulating executions. (R. C. 1855, p. 766, § 46.) Should no such notice be given, and property be levied on and sold under the execution, the defendant may on the return day of the execution move the court to set aside such sale, and the court should set aside the same although the sheriff may have executed the deed to the purchaser before the return day of the execution. *Ray* v. *Stobbs*, 35.
2. If a levy of an execution be made upon property not belonging to the defendant therein and such execution returned satisfied to the amount made by the execution sale, should the plaintiff in the execution be compelled to refund to the true owner the amount received by him from such sale, he will be entitled to have the satisfaction endorsed on the execution set aside and to have an execution issue for the full amount of the judgment. *Magwire* v. *Marks*, 193.
3. A. recovered a judgment against B. Execution was issued thereon and levied by order of A.—he giving the plaintiff an indemnification bond—on certain personal property in possession of B. but known by A. to be claimed by C. as trustee for the wife of B. The sheriff made sale of the property levied on, and the amount made was endorsed on the execution in *pro tanto* satisfaction thereof. C. sued the sheriff and recovered judgment against him for the amount made by said levy

SHERIFF'S SALES—(*Continued.*)

and sale, with interest, which was paid by A. *Held*, that A. was entitled to have the sheriff's return vacated and set aside so far as it stated a partial satisfaction of the execution, to have the same amended in accordance with the facts, and to have an execution issue for the whole amount of the judgment. *Id.*

SHIPPING.

See BOATS AND VESSELS.

SLANDER.

1. Where the slanderous words charged in a petition are not actionable in themselves, it is necessary to set forth, by way of inducement, those extrinsic facts and circumstances which make them actionable. *McManus* v. *Jackson*, 56.
2. It is not actionable to charge a person with swearing a lie unless it is shown by proper averments that the plaintiff was sworn as a witness in a judicial proceeding, and that the speaking of the offensive words had reference to such proceeding. *Id.*
3. It is not actionable to charge a person with giving a free pass to a negro, unless it be averred that the negro referred to was a slave; nor, if it be averred that the negro referred to was a slave, would such words be actionable unless it be also averred that the negro did not belong to plaintiff. *Id.*

SLAVERY.

1. When a slave is cruelly or inhumanly abused by a person who does not have such slave in his employment or under his charge, power or control, resort can not be had, in the punishment of such an offence, to an indictment founded on the forty-eighth section of the eighth article of the act concerning crimes and punishments. (R. C. 1855, p. 634.) *State* v. *Peters*, 241.
2. A. bequeathed a female slave with other property to his daughter B., and directed that all the property, real and personal, should be placed in the hands of C. for the use and benefit of said B. In a codicil to this will, duly executed, there was the following provision: "It is further my will that the negro girl Eliza, that I have bequeathed to my daughter B., shall have the privilege to choose some person to buy her in case she [shall] not be satisfied to live with my daughter B." The said slave communicated to the said C. her unwillingness to live with B. and made choice of a master, and C. sold her to the person thus chosen. *Held*, that the purchaser acquired a good title. *Beaupied* v. *Jennings*, 254.
3. A privilege, conferred by will upon a slave, of choosing some person to buy her in case she should not be satisfied to live with the person to whom she had been bequeathed, is not, it seems, inconsistent with the legal idea of slavery. *Id.*

SPECIFIC PERFORMANCE.

See STATUTE OF FRAUDS.

STATUTE OF FRAUDS.

See LANDLORD AND TENANT, 5. RESULTING TRUSTS.

1. Resulting trusts are not within the statute of frauds. *Cason* v. *Cason*, 47; *Morris* v. *Morris*, 114; *Cloud* v. *Ivie*, 578.
2. Where there is a parol sale of real estate and the vendee is placed by the vendor in such a situation that a fraud will be worked upon him unless the contract of sale is fully performed, this will be deemed such a part performance as will take the case out of the statute of frauds. *Dickerson* v. *Chrisman*, 134.
3. Justices of the peace can not specifically enforce a parol contract concerning land on the ground that it has been taken out of the statute of frauds by part performance. *Ridgley* v. *Stillwell*, 400.
4. A. let certain premises to B. for a term of years; the letting, being by parol, had the force and effect at law of a tenancy from year to year. A. gave B. due notice to quit, and brought his action of forcible detainer before a justice of the peace. B. relied for a defence upon the fact that he had entered upon said premises under a parol lease for ten years, while the building thereon was not completed, and had made improvements thereon, and had paid rent under said parol agreement. *Held*, that the justice of the peace had no jurisdiction to enforce the equities arising out of such a defence, and that, if the defendant was entitled to the specific enforcement of the parol agreement, he might have enjoined in a court of competent jurisdiction the proceedings before the justice until his equity could be determined. *Id.*
5. Where land owned by A. is in the adverse possession of B., and B. dies before the time of limitation is complete, devising his estate to his widow, but not naming or providing for his children in his will, and the widow remains in possession, not claiming under the will, but under an understanding with the children that she should enjoy the estate for life and that at her death it should go to them, and while she so remains in possession the time of limitation becomes complete and the widow's interest is levied on under a judgment against her and sold and she dies; *held*, that the agreement of the widow with the children would be valid though by parol, it not being within the statute of frauds; that the purchaser would take subject to such agreement, whether he had notice of it or not. *Chouquette* v. *Barada*.
6. Where two proprietors of land agree that one of them shall enter under the graduation law of Congress an adjoining tract of government land, each furnishing one-half the sum required to pay the graduation price, and that the one who enters shall convey one-half the tract to the other, and the entry is made under this agreement; *held*, that there will be a resulting trust as to one-half of the land entered. *Cloud* v. *Ivie*, 578.
7. A parol agreement respecting the sale of land, of which there has been part performance, is not within the statute of frauds. *Young* v. *Montgomery*, 604.

STATUTES—CONSTRUED AND NOTICED.

Arbitrations and References. (R. C. 1855, p. 193.) Hamlin v. Duke, 166.

Attachment. (R. C. 1855, art. 1, § 1.) Reed v. Pelletier, 173. (Art. 1,

STATUTES—CONSTRUED AND NOTICED—*(Continued.)*

§ 26.) McAllister v. Pennsylvania Ins. Co , 214; McAllister v. Commonwealth Ins. Co., 214. (Art. 1, § 9.) Wood v. Squires, 528. See Tucker v. Frederick, 574.

Boats and Vessels. (R. C. 1855, p. 30, § 1.) Lancaster v. Woodboat Hardin, 351. See, generally, Gregg v. Robbins, 347; Hight v. Robbins, 168.

Boggs, Wilber F.—Act for relief of. (Sess. Acts, 1857, p. 746.) Boggs v. Caldwell County, 586.

Bonds, Notes and Accounts. (R. C. 1855, p. 322, § 3.) Paston v. Bussmeyer, 330.

Boonville—Charter and acts amendatory thereof. (Sess. Acts, 1839, p. 297, § 11, 28; Sess. Acts, 1847, p. 183, § 3; Sess. Acts, 1841, p. 306.) Willis v. Boonville, 543.

Carondelet—Act of incorporation. (Sess. Acts 1851, p. 139.) Bowlin v. Furman, 427.

Change of Venue. Local act. (R. C. 1855, p. 1591, Appendix; *Id.* p. 539.) State v. Houser, 233.

Confirmations. (Act of Congress of May 26, 1824.) Williams v. Carpenter, 453. (Act of Congress of April 29, 1816.) St. Louis University v. McCune, 481. (Act of Congress of July 9, 1832, and of March 2, 1833.) O'Brien v. Perry, 500. (Act of Congress of June 13, 1812.) Milburn v. Hardy, 514. See Bowlin v. Furman, 427; Kennett v. Plummer, 142; Climer v. Wallace, 556.

Conveyances. (R. C. 1845, § 7.) Cravens v. Faulconer, 19. (R. C. 1825, § 12.) Garnier v. Barry, 438. (R. C. 1855, § 35.) West v. Best, 551. See Garnier v. Barry, 438.

Costs. (R. C. 1855, p. 441, art. 1, § 2.) Davis v. Farmer, 54.

Counties—Removal of seats of justice. (R. C. 1855, p. 513; Sess. Acts, 1857, Adj. Sess. p. 397.) Wood v. Phelps County Court, 119.

Courts. (R. C. 1855, p. 530, 540, § 48.) Dulle v. Deimber, 583.

Crimes and Punishments. (R. C. 1855, art. 8, § 8.) State v. Gardner, 90. (Art. 8, § 48.) State v. Peters, 634. See State v. Houser, 232; State v. Martin, 530; State v. Mitchell, 562; State v. Wells, 565; State v. Welch, 600.

Divorce—Act divorcing J. W. Honey and wife. (Sess. Acts, 1816, p. 80.) Chouteau v. Magenis, 187.

Dower. (R. C. 1845, p. 430, § 3.) Cason v. Cason, 47; Welch v. Anderson, 293. (R. C. 1855, p. 668, § 1.) Watson v. Watson, 300.

Dram-shops. (R. C. 1855, p. 682; R. C. 1845, p. 542, § 3.) State v. Andrews, 14, 17; State v. Mitchell, 562; State v. Wells, 565.

Elections. (R. C. 1855.) Castello v St. Louis Circuit Court, 259.

Evidence. (R. C. 1855, p. 733, § 58. Garnier v. Barry. 438.

Executions. (R. C. 1855, p. 746, § 46.) Ray v. Stobbs, 35. (R. C. 1845, § 52.) Dunnica v. Coy, 525.

Forcible Entry and Detainer. (R. C. 1855, p. 786.) Young v. Smith, 65.

Frauds and Perjuries. (R. C. 1855, p. 806.) Ridgley v. Stillwell, 400;

STATUTES, CONSTRUED AND NOTICED—(*Continued.*)

Chouquette v. Barada, 491; Cloud v. Ivie, 578; Young v. Montgomery, 604.

Fraudulent Conveyances. (R. C. 1855, p. 801.) Reed v. Pelletier, 173; Miller v. Bascom, 352; Hall v. Webb, 408; Gutzweiler v. Lachman, 434. (Act of December 6, 1821, 1 Terr. Laws.) Garnier v. Barry, 438. (R. C. 1855.) Dunnica v. Coy, 525; Billingley's Adm'r v. Bunce, 547.

Insurance Agencies. (R. C. 1855, p. 884.) McAllister v. Pennsylvania Insurance Co., 214; McAllister v. Commonwealth Ins. Co., 214.

Justices' Courts. (R. C. 1855, p. 924, 967, art. 8, § 20.) Magwire v. Marks, 193.

Kansas City Court of Common Pleas. (Sess. Acts, 1855, Adj. Sess. p. 60.) Ashburn v. Ayres, 75; Boggs v. Caldwell County, 586; Platt v. Smith, 593.

Landlord and Tenants. (R. C. 1855. p. 1017, § 33, 34.) Hunt v. Cobb, 198.

Law Commissioner's Court of St. Louis County. (R. C. 1855, p. 1596, Appendix.) Annis v. Bigney, 247.

Married Women's Real Estate. (Act of June 22, 1821, 1 Terr. Laws, 756.) Garnier v. Barry, 438.

Mechanics' Lien. Local act. (Sess. Acts, 1857, p. 668.) McPheeters v. Merimac Bridge Co., 465.

Merchants' Licenses. (R. C. 1855, p. 1072.) The State v. Andrews, 14; State v. Mitchell, 562; State v. Wells, 565.

Merimac Bridge Co.—Charter of. (Sess. Acts, 1853, p. 195.) McPheeters v. Merimac Bridge Co., 465.

Mills and Millers. (R. C. 1855, p. 1078.) Willoughby v. Shipman, 50.

Pacific Railroad. (Act of December 25, 1852; Sess. Acts, 1853, p. 10.) Kennett v. Plummer, 142.

Partition. (R. C. 1845, p. 764.) Waugh v. Blumenthal, 462.

Practice Act. (R. C. 1855, art. 6, § 10; art. 9, § 19.) Welch v. Bryan, 30. (Art. 12, § 22.) Bryan v. Miller, 32. (Art. 9, § 13.) Basye v. Ambrose, 39. (Art. 4.) Keyte v. Plemmons, 104. (Art. 10, § 12, 13.) Morris v. Morris, 114; Bray v. Thatcher, 129; Conran v. Sellew, 320. (Art. 2, § 1, 2.) Bock v. Nuella, 180. (Art. 6, § 10.) Syme v. Steamboat Indiana, 335. (Art. 7, § 11.) Hohenthal v. Watson, 360. (Art. 7.) St. Louis, Alton & Chicago Railroad Co. v. Castello, 379. (Art. 9, § 3.) Irwin v. Chiles, 576. (Art. 6, § 24.) Farrington v. McDonald, 581. (Art. 10, § 6.) Dulle v. Deimler, 583.

Practice and Proceedings in Criminal Cases. (R. C. 1855, p. 1178, art. 4, § 33, 34, 35.) State v. Nelson, 13. See State v. Montgomery, 594.

Railroad Corporations. (R. C. 1855, p. 430, § 38, 51.) Fatchell v. St. Louis & Iron Mountain Railroad Co., 178; Mooney v. Hannibal & St. Joseph Railroad Co., 570.

Revenue. (Sess. Acts, 1857, Adj. Sess. p. 75.) State v. Welch, 600; Harris

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v. Buffington, 53. (Sess. Acts, 1847, p. 117; R. C. 1855, p. 1360, § 35, 36.) Stewart v. Brooks, 62.)

Roads and Highways. (R. C. 1855, art. 2, § 20.) Bernard v. Callaway County Court, 37.

St. Louis & Iron Mountain Railroad Co. — Charter of. (Sess. Acts, 1851, p. 479.) Fatchell v. St. Louis & Iron Mountain Railroad Co. 178.

Sheriff and Marshal—Act St. Louis county. (Sess. Acts, p. 464.) Bradley v. Holloway, 150; St. Louis, Alton & Chicago Railroad Company v. Castello, 379.

Trespass. (R. C. 1845, p. 1068.) Brewster v. Link, 147.

Wills. (R. C. 1855, p. 1565, § 4, 17, 18, 30.) Cravens v. Faulconer, 19. (R. C. 1825, § 18.) Cravens v. Faulconer, 19. (R. C. 1835, p. 630, § 30.) Hill v. Martin, 78. (R. C. 1825, p. 795, § 20.) Chouquette v. Barada, 491.

SUBMISSION.

See ARBITRATION.

SURVEY.

See LANDS AND LAND TITLES.

T

TAXES.

See REVENUE.

TAXABLE PROPERTY.

1. In an indictment founded on the fifteenth section of the second article of the revenue act of 1857, (Sess. Acts, 1857, Adj. Sess. p. 79,) for delivering to the assessor a false and fraudulent list of taxable property, it must appear in what respect the list delivered is false and fraudulent; the indictment must set out, in terms of general description at least, the taxable property owned by the defendant and fraudulently omitted in the list delivered. *State* v. *Welch*, 600.

TERMS OF COURT.

See COSTS. COURT.

TERRITORIAL LEGISLATURE.

See DIVORCE, 3.

TRESPASS.

1. In actions founded on the "act to prevent certain trespasses," (R. C. 1845, p. 1068,) the jury can assess single damages only; the jury should assess the value of the property taken or injured; the court will then, if a proper case be made out, give judgment for treble the amount so assessed. *Brewster* v. *Link*, 147.
2. The question of "probable cause" is in such cases to be determined by the court. *Id.*

TRESPASS—*(Continued.)*

3. Where the petition contains counts under the statute and at common law, and the jury render a general verdict, the court is not authorized to treble the damages. *Id.*

TRIALS BY THE COURT.

1. Where a plaintiff seeks relief other than the recovery of money only or of specific real or personal property — as where the annulment of deeds is sought on the ground that they were obtained by duress and violence —the cause must be tried by the court and not by the jury. *Bray* v. *Thatcher*, 129.
2. The issues of fact in an action brought to obtain the surrender and cancellation of a promissory note must be tried by the court, unless the court takes the opinion of a jury upon some specific question of fact involved therein, by an issue made up for that purpose. (R. C. 1855, p. 1261, § 13.) *Conran* v. *Sellew*, 320.
2. Where the trial must be by the court, instructions or declarations of law in the form of instructions are not required, and if given will not be reviewed or noticed by the supreme court. *Id.*

TRUSTS.

See EQUITY. FRAUD AND FRAUDULENT CONVEYANCES. RESULTING TRUSTS.

V

VENDORS AND PURCHASERS.

See CONVEYANCE.

1. In order that fraudulent representations made by a vendor to a vendee with respect to the character of the improvements upon the land sold may be the basis of relief to the purchaser in an action by the vendor on a promissory note given for a portion of the purchase money, it must appear that the misrepresentations were made with respect to something material and constituting an inducement to the contract. *Hodges* v. *Torrey*, 99.
2. Declarations of a grantor of real estate, made before the grant, to the effect that he had previously sold said real estate to another, are admissible in evidence against such grantee and all persons claiming under him. *Dickerson* v. *Chrisman*, 134.
3. Where there is a parol sale of real estate, and the vendee is placed by the vendor in such a situation that a fraud will be worked upon him unless the contract of sale is fully performed, this will be deemed such a part performance as will take the case out of the statute of frauds. *Id.*
4. A. conveyed to B. a slave in trust to secure and indemnify the latter against loss by reason of his being security for A. B. acting under a power in the deed of trust sold said slave to C., taking a bond to himself "as trustee of A." for a portion of the purchase money. The slave was afterwards taken from the possession of C. by the true owner

VENDORS AND PURCHASERS——(*Continued.*)

from whom A. had stolen him. *Held*, that there was a failure of consideration of the bond, and payment thereof could not be enforced against C. *Long* v. *Gilliam*, 560.

5. A parol agreement respecting the sale of land, of which there has been part performance, is not within the statute of frauds. *Young* v. *Montgomery*, 604.

W

WAIVER.

See JUSTICES' COURTS, 5. BILLS OF EXCHANGE AND PROMISSORY NOTES, 11.

WILLS AND TESTAMENTS.

1. It is not necessary, in order to give validity to a will, that the testator should actually sign the same in the presence of the attesting witnesses. *Cravens* v. *Faulconer*, 19.
2. The attesting witnesses must subscribe their names to the will in the presence of the testator; but it is not necessary that they should subscribe in the presence of each other. *Id.*
3. In a statutory proceeding to contest the validity of a will, the burden of proof rests upon the defendants; consequently they have the right to open and close the case to the jury. *Id.*
4. In the year 1842, a testatrix, domiciled in the state of Kentucky, died there. By her will she made the following bequest: "I give and bequeath to my daughter, Margaret Dean, a negro girl named Hannah, for to be at her disposal during her natural life, then to go to the benefit of her heirs." *Held*, that the daughter took an estate for life only, with remainder to her heirs, who would take under the will by purchase. *Riggins* v. *McClellan*, 23.
5. The rule in Shelly's case was not in force as law in the state of Kentucky in 1842 at the death of the testatrix. *Id.*
6. A. bequeathed a female slave with other property to his daughter B., and directed that all the property, real and personal, should be placed in the hands of C. for the use and benefit of said B. In a codicil to this will, duly executed, there was the following provision: "It is further my will that the negro girl Eliza, that I have bequeathed to my daughter B., shall have the privilege to choose some person to buy her in case she [shall] not be satisfied to live with my daughter B." The said slave communicated to the said C. her unwillingness to live with B. and made choice of a master, and C. sold her to the person thus chosen. *Held*, that the purchaser acquired a good title. *Beaupied* v. *Jennings*, 254.
7. A privilege, conferred by will upon a slave, of choosing some person to buy her in case she should not be satisfied to live with the person to whom she had been bequeathed, is not, it seems, inconsistent with the legal idea of slavery. *Id.*

WILLS AND TESTAMENTS—(*Continued.*)

8. A will not providing for children of the testator, though voidable under section twenty of the act concerning wills and testaments, (R. C. 1825, p. 795,) by such children, is good as against strangers; unless the children assert their right against the will, the title will remain in the devisee, who will have, however, a defeasible title. *Chouquette* v. *Barada*, 491.
9. Where land owned by A. is in the adverse possession of B., and B. dies before the time of limitation is complete, devising his estate to his widow, but not naming or providing for his children in his will, and the widow remains in possession, not claiming under the will, but under an understanding with the children that she should enjoy the estate for life and that at her death it should go to them, and while she so remains in possession the time of limitation becomes complete and the widow's interest is levied on under a judgment against her and sold and she dies; *held*, that the agreement of the widow with the children would be valid though by parol, it not being within the statute of frauds; that the purchaser would take subject to such agreement, whether he had notice of it or not. *Id.*

WITNESS.

See EVIDENCE.

1. In a suit against a corporation, a stockholder thereof is a competent witness in behalf of the corporation. (Barclay v. Globe Mutual Insurance Co. 26 Mo. 490, affirmed.) *Bredow* v. *Mutual Savings Institution*, 181.
2. To render an assignment of a patent right or of an undivided part thereof valid, it is not necessary that it should be recorded in the United States patent office; the assignee will have a vendible interest without such record. *Sone* v. *Palmer*, 539.